







CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

FEBRUARY 4, 1929 (IN PART), TO MAY 31, 1929

WITH

ABSTRACT OF DECISIONS OF THE SUPREME COURT IN COURT OF CLAIMS CASES

REPORTED BY

EWART W. HOBBS

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Auditors

EWART W. HOBBS.
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J. BRADLEY TANNER.

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FRED C. KLEINSCHMIDT.

Bailiff

J. J. MARCOTTE

Assistant Attorney General

(Charged with the defense of the Government)

HERMAN J. GALLOWAY



COMMISSIONERS

(Act of February 24, 1925, 43 Stat. 964; act of January 11, 1928, 45 Stat. 51)

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JOHN M. LEWIS, of Indiana.
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CASES DECIDED

IN

THE COURT OF CLAIMS

FEBRUARY 4, 1929 (IN PART), TO MAY 31, 1929

CARL G. ALLGRUNN v. THE UNITED STATES

[No. 34696]

On the Proofs

Patents; validity; infringement.—The Allgrunn patent on rifling tool and method of using same, Letters Patent No. 1311107, granted July 22, 1919, *held* valid, and infringed by the United States.

Same; secrecy order, act of October 6, 1917; withholding grant of patent.—The provision in the act of October 6, 1917, granting the right of suit for compensation in the Court of Claims to one "whose patent is withheld," for reasons of public safety, until the termination of war, gives the inventor a cause of action against the United States, if after tender of his invention the United States uses it, prior to the grant of patent, when the same is ultimately granted, and is not limited to the suspension of an allowed application for patent.

Same; abandonment in prior art.—Where a device is merely a casual mechanism designed to accomplish a single purpose, is immediately abandoned, and the thing accomplished is nothing more than a simulation of what the patent in question actually attains, the device is not anticipatory.

Same; new combination of old elements; accomplishment.—The combination of old elements in such a way as to accomplish a result not attainable by previous combinations is invention.

Same; tender of use.—Where the Government continues the use of an invention after tender under the act of October 6, 1917, the relief afforded the inventor includes unauthorized use preceding tender.

Same; acquiescence by the Government of use by Government contractors.—Where Government contractors, working on a cost-plus basis, employ, with the knowledge, acquiescence, and encouragement of the Government and to its benefit, an invention the use of which is tendered the Government under the act of October 6, 1917, the inventor may recover for such use by suit in the Court of Claims.

Same; recovery by employee of Government contractor.—An employee of a Government contractor using his employer's labor and property to perfect his invention, and assenting to the use of his invention by his employer, can not recover from the United States compensation for such use.

The Reporter's statement of the case:

Mr. Frank Keiper for the plaintiff.

Mr. John S. Bradley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Harry E. Knight* was on brief.

Decided December 3, 1928. Withheld from preceding volume.

The court made special findings of fact, as follows:

I. Plaintiff has been a naturalized citizen of the United States since 1888 and during the time covered by the claim herein resided in Rochester, New York.

II. Plaintiff since becoming a citizen of the United States has borne true allegiance to the United States and has never voluntarily aided or abetted or given encouragement to rebellion against the United States or to the enemies of the United States.

III. Plaintiff is an experienced maker of cannon, having worked at the making, rifling, and finishing of cannon at the shops of the Bethlehem Steel Company, Bethlehem, Pa., From July, 1900, to November, 1916, first as machinist and thereafter for eleven years as foreman of the finishing department in gun shop No. 2, in which capacity he had charge of all the tool making and finishing of sights, making of rifling heads, and finishing of gun mechanisms, and the assembly work connected therewith.

IV. In June, 1917, plaintiff accepted employment at the Symington-Anderson Company, of Rochester, New York,

as superintendent of the gun-finishing department. One of his duties was the determination of the equipment required for the plant.

In this connection in July, 1917, plaintiff conceived the idea of performing the rifling operation upon the guns which the Symington-Anderson Company had contracted to make for the United States by a method and tool upon which he later secured the U. S. letters patent in suit No. 1311107 of July 22, 1919. He immediately suggested its use to his superior, Mr. Anderson, who authorized the expenditure of $500 of the company's funds in making and testing an experimental head.

Thereafter the idea was disclosed in two drawings made by Herman P. Landrock, another employee of the Symington-Anderson Company, the first on July 20, 1917, and the second in August, 1917, and a blue print on August 24, 1917, from which the detailed drawings were prepared.

V. On Thanksgiving Day, 1917, the experimental rifling tool was succéssfully tested at the Symington-Anderson plant in the presence of five other members of the Symington-Anderson organization and a final tool was perfected and made by the Symington-Anderson Company and put to use about February 1, 1918. All of the rifling of guns at the Symington-Anderson Co. was performed by this or substantially identical tools. This tool is shown in plaintiff's Exhibits 28, 29, 70, and 71, which are by reference made a part of this finding of fact as Exhibits A, B, C, and D.

VI. On February 19, 1918, plaintiff sold a half interest in his idea to one Frederick G. Lee for the purpose of exploiting it, which was reassigned to plaintiff on September 26, 1918.

The assignment to Frederick G. Lee dated February 19, 1918, contained a reservation to the plaintiff of profits in the following language: "As to the money received from the use of the invention by the Symington-Anderson Co. of Rochester, N. Y., the full amount of this money is to be received by Carl G. Allgrunn."

VII. On February 23, 1918, plaintiff made application for United States letters patent upon his idea, which application subsequently materialized into the patent in suit.

On or about the time of filing of this application Mr. Anderson stated to plaintiff:

"This is your invention; you have fathered the thing and brought it up to perfection and made it a great success, and I want you to have whatever money there is to be gotten out of it, and I will do all in my power to help you get it."

He also said:

"Whatever I do in this matter will be sanctioned by Mr. Symington, as he feels the same way I do about it; so you go right ahead and get the patent in your own name, and we will do whatever we can to help you get money out of it."

A similar statement was made by Mr. Anderson to Mr. Allgrunn in July or August of 1917.

At the time of filing this application a request to make action "special" on the same was addressed to the Commissioner of Patents as follows:

FEBRUARY 23, 1918.

COMMISSIONER OF PATENTS,
Washington, D. C.

SIR: I beg to call your attention to the application of Carl G. Allgrunn on a rifling tool and method of using same, which application is being sent to you under separate cover.

I believe that this application describes an important improvement in the art of rifling gun barrels. The tool is now being introduced in the Symington-Anderson Company, of Rochester, N. Y., which is making field guns for the Army.

Because of the importance of this application on account of the war we ask that it may be examined special and considered in advance of its regular term.

Very truly yours,

(Signed) FRANK KEIPER.

The commissioner refused to grant such request.

VIII. The history of the application is found in the file wrapper and contents of application #218722, which is by reference made a part of this finding of fact as Exhibit E.

It appears therefrom that all the submitted claims were rejected by an office action of June 29, 1918.

During the war pending applications in the Patent Office were available for inspection to authorized officers of the Army and Navy, in accordance with rule 15, Rules of Prac-

tice of the United States Patent Office, which was amended for this purpose as indicated by the following italicized portion:

15. Pending applications are preserved in secrecy. No information will be given, without authority, respecting the filing by any particular person of an application for a patent or for the reissue of a patent, the pendency of any particular case before the office, or the subject matter of any particular application, unless it shall be necessary to the proper conduct of business before the office, as provided by Rules 97, 103, and 108, *except that authorized officers of the Army and Navy will be allowed during the war to inspect cases which in the opinion of the Commissioner disclose inventions that might be of value in the prosecution of the war, after having filed a duly executed oath with the Commissioner that no contents of any application will be divulged except as it may become necessary in the prosecution of the war.*

On July 2, 1918, the following communication was mailed to plaintiff:

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
Washington, June 29, 1918.

Serial No. 218,722. For rifling tool and
Filed Feb. 23, 1918. method of using same.

CARL G. ALLGRUNN,
c/o Frank Keiper, # 6 State St., Rochester, N. Y.

To CARL G. ALLGRUNN, his assignees ½ to FREDERICK G. LEE, of Rochester, N. Y., his heirs, and any and all his agents:

Under the provisions of the act of October 6, 1917 (Public, No. 80; 243 O. G.–797), you are hereby notified that your application as above identified has been found to contain subject matter which might be detrimental to public safety or assist the enemy in this present war, and you are hereby ordered to in nowise publish the invention or disclose the subject matter of said application, except that the invention may be disclosed to officials of the War and Navy Departments of the United States, but to keep the same secret during the period of the present war (unless by written permission, first obtained of the Commissioner of Patents), under the penalty of the patent being held abandoned. This application must be prosecuted under the rules of practice until a notice is received from the office that the case is in condition for allowance. Such notice closes the prosecution of the case, except under provisions similar to those set forth in rule 78. Furthermore, if previously allowed and now with-

drawn the prosecution of the case is likewise closed. When the application is in condition for allowance it will be withheld from issue during the period of the war.

Your attention is also called to the provisions of section 16 of the trading with the enemy act of Oct. 6, 1917 (Pub., No. 91).

This order should not be construed in any way to mean that the Government has adopted or contemplates adoption of the alleged invention disclosed in this application, nor is this order any indication of the value of such invention.

J. T. NEWTON, *Commissioner.*

On July 2, 1918, the Federal Trade Commission addressed the following communication to the plaintiff, Mr. Frank Keiper, and Frederick G. Lee:

FEDERAL TRADE COMMISSION,
Washington, July 2, 1918.

CARL G. ALLGRUNN,
Rochester, N. Y.
FRANK KEIPER,
6 State Street, Rochester, N. Y.
FREDERICK G. LEE,
Rochester, N. Y.

(In re application for United States patent of Carl G. Allgrunn, S. N. 218722, filed Feb. 23, 1918, for rifling tool and method of using same.)

GENTLEMEN: Enclosed is a duly certified copy of an order of the Federal Trade Commission with reference to the matter identified in the caption of this letter. Violation of this order entails a fine of not more than ten thousand dollars ($10,000) or imprisonment of not more than ten (10) years, or both. You are directed to govern yourself accordingly.

The issuance of this order is not to be construed as meaning that the Government has adopted or contemplates the adoption of the invention, and is not indicative of its value.

Please acknowledge receipt of the order.

Very truly yours, FEDERAL TRADE COMMISSION,
By L. L. BRACKEN, *Secretary.*

United States of America, Federal Trade Commission

(In the matter of enjoining publication of certain patents and secrecy of inventions)

JUL. 2, 1918.

It appearing to the Federal Trade Commission that the publication of certain alleged inventions, for which applica-

tions for patents have been made in the United States Patent Office, and which are fully identified in a schedule filed with the Federal Trade Commission July 1, 1918, said schedule being dated July 1, 1918, and now in the files of the Federal Trade Commission, may be detrimental to the public safety or defense and may assist the enemy and endanger the successful prosecution of the war, and that said alleged inventions are in whole or in part known to the alleged inventors, assigns, if any, and their solicitors.

Therefore, in conformity with the provisions of the trading with the enemy act, and of the Executive order of October 12, 1917,

It is ordered that without the consent or approval of the Commissioner of Patents or license from the Federal Trade Commission the said inventors, assigns, if any, and solicitors, and each thereof, and all others having knowledge of the said inventions or any thereof, keep the said inventions and each of them secret and refrain from publication or any disclosure thereof, except to the Secretary of War, the Secretary of the Navy, and such other persons as they may officially designate in writing.

It is further ordered: That a copy of this order be served upon the said inventors, assigns, if any, and solicitors, by registered mail forthwith.

A true copy of the order this day entered.

[SEAL.] FEDERAL TRADE COMMISSION,
Attest: L. L. BRACKEN, *Secretary.*

On August 18, 1918, plaintiff requested permission from the Commissioner of Patents to use the invention or to authorize the use of the invention disclosed in the above-mentioned application in the shop of Symington-Anderson Company of Rochester, N. Y., and the Wisconsin Gun Company of Milwaukee, Wis. Such permission was granted by the commissioner under date of August 18, 1918.

An amendment and argument was filed in the Patent Office September 27, 1918, and an office action was made in response thereto November 2, 1918, stating that claims 1, 4, 10 to 14, and 17 to 18 were allowable in substance and rejecting other claims.

In response to this action an amendment and argument was filed on November 8, 1918.

On December 9, 1918, the Assistant Secretary of War filed in the United States Patent Office a petition for public-use

proceeding, asking that the War Department be permitted to take testimony to show that the invention set forth in the above-noted application had been in prior public use, and that a patent could not be lawfully issued to plaintiff, which proceeding was decided in favor of plaintiff on May 29, 1919.

On December 10, 1918, the Commissioner of Patents wrote plaintiff as follows:

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
Washington, December 10, 1918.

Rescinding order

(Appl. Carl G. Allgrunn. Filed Feb. 23, 1918; Ser. No. 218722)

CARL G. ALLGRUNN,
% Frank Keiper,
6 State Street, Rochester, N. Y.

The order of the commissioner dated June 29, 1918, preventing disclosures or publication of the subject matter of the above-entitled application during the period of the war issued to the applicant and other parties of record is hereby rescinded and the application is before the examiner for further action or for allowance.

J. T. NEWTON, *Commissioner.*

On April 15, 1919, the Federal Trade Commission addressed the following letter to plaintiff's attorney:

FEDERAL TRADE COMMISSION,
Washington, April 15, 1919.

MR. FRANK E. KEIPER, M. E.,
Attorney at Law,
6 State Street, Rochester, N. Y.

DEAR SIR: Your communication of April 8, 1919, relative to certain applications for patent of Carl G. Allgrunn, is acknowledged. Your statement is noted that under date of December 10, 1918, the Commissioner of Patents rescinded the orders of secrecy which had been entered in connection with the applications for patents referred to. In view of the rescinding by the Commissioner of Patents of his order of secrecy in this matter the inventor is at liberty to make what disclosure of the invention he desires, as under the circumstances no vacating order of the commission is necessary.

Very truly yours, FEDERAL TRADE COMMISSION,
J. P. YODER, *Secretary.*

Notice of allowance was sent plaintiff on June 27, 1919, and the patent in suit was issued on July 22, 1919, which patent is as follows:

United States Patent Office

Carl G. Allgrunn, of Rochester, New York

Rifling-tool and method of using same

1311107. Specification of Letters Patent. Patented July 22, 1919

Application filed February 23, 1918. Serial No. 218,722

To all whom it may concern:

Be it known that I, Carl G. Allgrunn, a citizen of the United States, residing at Rochester, in the county of Monroe and State of New York, have invented certain new and useful Improvements in Rifling-Tools and Methods of Using Same, of which the following is a specification.

This invention relates to tools for cutting the rifling grooves in gun barrels and its object is to provide a new and improved tool and a new method of using it by means of which the operation of rifling a gun barrel is simplified and the time for performing this operation is greatly reduced.

With this and other objects in view, this invention presents a novel construction comprising a combination and arrangement of parts which will be fully illustrated in the drawings described in the specification and pointed out in the claims at the end thereof.

In the corresponding drawing—

Figure 1 is a diagrammatic view of a rifling machine.

Fig. 2 is a detail view of the improved rifling tool and parts associated therewith, the tool being shown partly in section.

Fig. 3 is a vertical section through the pilot for the tool holder, the section being taken on the line 3^x—3^x of Fig. 2.

Fig. 4 is a vertical section through the tool holder on the line 4^x—4^x of Fig. 2, showing an elevation of the oil-distributing sleeve of the tool.

Fig. 5 is a vertical section through the tool holder on the line 4^x—4^x of Fig. 2 looking toward the right-hand end of the tool holder and showing a front elevation of the tool mounted thereon.

Reporter's Statement of the Case

Fig. 6 is a vertical cross section through the tool holder and guide sleeve therefor, the section being taken on the line 6ˣ—6ˣ of Fig. 2.

Fig. 7 is a cross section through the shank of the tool holder, the section being taken on line 7ˣ—7ˣ of Fig. 2.

Fig. 8 is a detail perspective view of the rifling tool proper.

Fig. 9 shows cross sections through three different broaches of one series.

In the several figures of the drawing like reference numerals indicate like parts.

Gun barrels are rifled for the purpose of giving greater accuracy of fire. This rifling consists of a string of parallel grooves, running spirally along the inside of the barrel. The cutting of these rifling grooves is the subject of my invention. The rifling operation has heretofore been done by means of a tool which is provided with two cutting edges that are placed diametrically opposite each other on the rim of the tool holder, each of which cutting edges cuts a single groove, so that two of the spiral grooves are cut at a time by the machine. If the gun barrel contains 24 rifling grooves, 12 operations are necessary to make one cut in each of the 24 grooves. Each groove requires a number of cuts in order to make it the desired depth. In a 3″ gun about 24 cuts are necessary in each groove to bring it to the desired depth; so that, in all, twelve times 24, or 288, cuts, are necessary to complete the rifling operation of a 3″ gun barrel having 24 grooves therein.

In some cases three, or even four, cutting edges have been used at a time, but in any case the total number of cutting edges used simultaneously has never been more than a small fraction of the total number of grooves to be cut in the barrel.

With larger guns the number of grooves cut are greater in number.

The location of the cutting tools for the different rifling grooves is changed by rotating the groove of the rifling bar for each change of grooves operated on, the cutting tools remaining stationary in the cutting head.

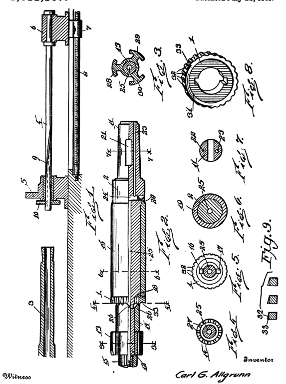
It has been customary for the cutting tool to take off a thin cut of one or two thousandths of an inch, and after each cut has been completed it has been customary to advance the cutting edge radially so as to use the same cutting edge for successive cuts of increasing depth. It has been necessary after each cut is made to draw the cutting edges in radially so that they will not come into contact with the gun

C. G. ALLGRUNN.

RIFLING TOOL AND METHOD OF USING SAME.

APPLICATION FILED FEB. 23, 1918.

1,311,107. **Patented July 22, 1919.**



Witness Eric Eschinger

Carl G. Allgrunn Inventor

By Frank Keiper. Attorney

barrel on the return movement of the tool holder. Failure to move the cutting edges in has caused the scoring and consequent loss of many gun barrels. The rifling operation is one of the last operations to be performed in the making of the gun barrel, and the loss is, therefore, very great if the gun barrel is spoiled thereby because it means the loss of all the work previously done on the gun.

In rifling 3″ or 75 mm. gun barrels by my invention but twelve cutting operations are necessary to complete the work. All of the rifling grooves are cut simultaneously and uniformly.

In the method used for rifling the same gun barrel by means of the tool comprising this invention only 12 cutting operations are necessary to produce the same result. For this purpose a special cutter 1 is provided which is mounted on the tool holder 2 as will hereinafter be described. This cutter has one cutting edge thereon for each groove to be cut in the barrel.

The rifling of a gun barrel is done on a machine which is provided with suitable means on which a gun barrel 3 is centered and rigidly held in place thereon. The gun barrel 3 when placed on this machine has its bore completely finished and the mouth of the gun barrel is held in place on the rifling machine ready to allow the rifling tool to enter the barrel.

The rifling tool is mounted on the end of the rifling bar 4 which passes through the head stock 5 of the machine. The rear end of the rifling bar 4 is mounted in a movable tail stock 6 which is provided with a threaded sleeve 7 that engages the lead screw 8 suitably mounted in the machine.

On the rotation of the lead screw in one direction the tail stock which carries the end of the rifling bar is moved toward the left and forces the rifling tool mounted on the front end of the rifling bar into the bore of the gun barrel.

In order to give the rifling tool the required rotation while passing through the bore of the gun barrel so as to produce the spiral grooves which form the rifling of the gun barrel, the rifling bar is provided with a longitudinal spiral groove 9 in which engages a stationary pin 10 provided in the head stock 5.

On the movement of the rifling bar forward to the left or rearward to the right in Figure 1 the pin 10 operates to give the rifling bar a twisting motion corresponding to the lead of the spiral grooves 9 provided therein. It is this twisting motion of the rifling bar which forces the rifling tool along in a spiral motion through the bore of the gun barrel.

Reporter's Statement of the Case

The rifling tool mounted on the end of the rifling bar 4 comprises the tool holder 2 which is provided with the shank 11 on one end of the tool holder and the extension 12 which is of reduced diameter on the other end thereof. A pilot 13 and the oil-distributing sleeve 14 is slipped over the extension 12 and is firmly forced against the rifling tool 1 by means of the clamping nut 15 screwed to the end of the threaded extension 12.

The rifling tool 1 is held in place and is properly centered on the tool-holder tube by means of the keys 16 and 17 which project into corresponding keyways provided in the tool 1. The rear of the tool 1 rests against the shoulder 18 provided in the tool holder 2 against which it is firmly held by means of the clamping nut 15 which forces both the pilot 13 and the oil-distributing sleeve 14 against the front face thereof.

The central portion of the tool holder 2 is surrounded by the guide sleeve 19 which corresponds in diameter to the bore of the gun barrel which is to be rifled with the rifling tool 1. The guide sleeve 19 extends from the rear of the rifling tool 1 to a shoulder 20 provided around the periphery of the tool holder 2 and near the left hand end thereof. The guide sleeve 19 is also clamped in place on the tool holder by means of the clamping nut 15 because the pressure applied to the tool 1 is communicated to the left-hand end of the sleeve 19 which forces the right-hand end thereof firmly against the shoulder 20 of the tool holder.

The shank 11 of the tool holder is tapered so as to fit into a corresponding socket provided in the end of the rifling bar 4 in which it is held in place by means of a key which passes through the rifling bar and the slot 21 provided in the shank 11 of the tool holder.

For the purpose of supplying oil or other liquid to the rifling cutter 1 for the proper lubrication thereof the tool holder is provided with a pair of longitudinal channels 22 and 23 which pass through the shank 11 on either side of the slot 21 and terminate into the cross slot 24. A central but larger longitudinal channel 25 in turn branches off from the cross channel 24 through which the liquid passes to the radial openings 26, 26 and from thence into the distributing channels 27, 27 provided in the sleeve 14.

As shown in Figs. 2 and 4, the distributing sleeve has its opening on the right-hand side thereof enlarged, and it is the circular space around the extension 12 provided by the enlargement of the inside of the sleeve 14 through which the lubricant passes from the radial openings 26 in the tool holder to the radial grooves 27 on the end of the sleeve 14,

so as to supply the cutting edges of the rifling tool with the necessary lubricant.

The pilot 13 mounted near the front extension 12 of the tool holder is provided with three guiding shoes 28, 29, and 30 which are suitably spaced apart on the periphery thereof, leaving open spaces between them. The outside diameter of the pilot, except the front end thereof, corresponds to the inside diameter of the gun barrel which is to be rifled, and serves to guide the tool through the gun barrel and properly centers it therein before it enters the mouth of the gun barrel. The front end of the pilot 13 is slightly tapered so as to allow the pilot to enter the bore of the gun barrel with ease and center it therein.

The rifling tool 1 which performs the cutting operation comprises the circular disk 31 which has the broaching teeth 32, 32 provided on the periphery thereof. These broaching teeth are slightly undercut at the front end thereof by means of the circular groove 33 which is provided in the front face of the tool adjoining the cutting edges of the broaching teeth.

The broaching teeth 32 taper toward the rear and slightly decrease in height so that the front end thereof forms a very sharp cutting edge, the outline of which conforms to the grooves to be cut into the bore of the gun barrel.

The spaces provided between the broaching teeth 32 are deep enough so that the lands of the bore of the gun barrel will not be cut thereby at these points.

The ridges or lands for the rifling are thus left in the barrel as the cutting tool passes through the bore of the barrel and forms the grooves between the lands.

These spiral grooves between the lands are cut by a series of tools, preferably 12 in number, each of which is slightly larger than the other. The broaching teeth in the first of these cutters are flat at the top and are not very high and the outline of them is shown in elevation in Fig. 5. Each succeeding cutter has its teeth slightly increased in height until the last or finishing cutter is provided with teeth which have a cutting edge corresponding to the outline and depth of the grooves which are to be cut into the finished bore of the barrel. These cutters are used in succession, the smaller cutter being replaced by the next larger cutter for the next operation, each cutter cutting about two-thousandths of an inch radially from the grooves. Each cutter goes forward through the barrel once and is taken off at the end of the forward stroke, after which the tool holder returns blank for the next cutter.

Reporter's Statement of the Case

The open spaces in the pilot left between the segmental guiding shoes are provided for the purpose of allowing the chips from the cutting tool to pass out through them as fast as the chips are cut off so as to leave the teeth of the tool free of obstruction during their cutting operation. The chips are carried out by the flow of the lubricating oil. Such chips as do not pass out can remain in the space between the pilot and the cutting tool, which space is made large enough to hold all the chips that may accumulate in a single cut. This space is cleaned out at the end of each cutting operation before the rifling bar is drawn back through the barrel of the gun. The short chips are readily flushed out with the oil while the long chips or ribbons accumulate to a greater or less extent in the open space between the pilot and the tool.

As each cutting tool wears it can be ground down to the next smaller size and used over again. In this way a single large cutter would pass through all the sizes of the series and eventually become the smallest cutter, and only the largest size cutter need be furnished new as each reduction in the sizes of the cutters takes place.

In operation, the barrel of the gun is first placed in the machine and properly centered therein, and the rifling bar is equipped with the shank, cutter, sleeves, and pilot and made ready for use, the parts being held in place by the nut. The rifling bar with the small cutter is driven through the barrel of the gun until the cutter emerges from the far end of the gun. The chips are then wiped off and the nut, pilot, and oil-distributing sleeve taken off of the shank and the cutter is then removed and the oil-distributing sleeve and pilot and nut are replaced on the shank, after which the rifling bar is drawn back through the barrel of the gun. Then the oil-distributing sleeve and pilot are again taken off and the next larger cutter is put on the shank, after which the rifling bar is again driven through the barrel. This operation is repeated with each successive larger cutter until all twelve cutters have been used in succession, using one at a time. In a 3″ gun, each operation requires between 2 and 3 minutes, and with the passage of the last and largest cutter the rifling of the gun is completed.

As each cutter advances through the gun, the oil is turned on so it flows through the rifling bar and floods and washes the cutter, carrying away the chips. After the cutter has passed into the powder chamber, the oil is turned off and remains turned off until the cutting operation of the next cutter begins.

From the foregoing it will be seen that the rifling operation on a gun barrel by means of this tool is completed in 12

operations, each of which consists of forcing one of the special cutting tools through the inside of the barrel by means of the rifling bar.

I claim:

1. The process of rifling a gun barrel which consists in forcing one at a time a series of circular disks having broaching teeth integral therewith and equally distributed over the periphery thereof through said gun barrel, the teeth on said disks being higher in each succeeding disk that is forced through the gun barrel.

2. A rifling tool comprising a disk, said disk having broaching teeth integral therewith and distributed over the periphery thereof, each of said teeth having a sharp cutting edge at the front thereof and having its body inclined laterally toward the rear thereof to accommodate the different pitches of the spiral grooves cut by said teeth.

3. In a rifling tool the combination of the tool holder, said tool holder having a pilot mounted at the front thereof, a tool comprising a disk having broaching teeth integral therewith and equally distributed over the periphery thereof mounted on said tool holder in back of said pilot, a detachable guiding sleeve mounted on said tool holder in back of said tool, and means for attaching said tool holder to the end of a rifling bar.

4. The process of rifling a gun barrel which consists in forcing one at a time a series of elements having broaching teeth integral therewith completely through said gun barrel, the teeth on said elements being higher in each succeeding element that is forced through the gun barrel.

5. A rifling tool comprising a circular disk, said disk having cutting teeth integral therewith and equally distributed around the periphery thereof, each of said cutting teeth having a sharp cutting edge at the front thereof and having its body inclined on one side to accommodate the different pitches of the spiral grooves cut by said teeth.

6. A rifling tool comprising a circular disk, said disk having cutting teeth integral therewith and equally distributed around the periphery thereof, each of said cutting teeth having a sharp cutting edge at the front thereof and having its body inclined on one side to accommodate the different pitches of the spiral grooves cut by said teeth, said tool being undercut on its forward face.

7. A rifling tool comprising a circular disk having cutting teeth integral therewith and equally distributed around the periphery thereof, each of said cutting teeth having a sharp cutting edge at the front thereof and having its body extending parallel to the axis of the tool on one side and inclined on

the other side to accommodate the different pitches of the spiral grooves cut by said teeth.

8. A rifling tool comprising a circular disk having cutting teeth integral therewith and equally distributed around the periphery thereof, each of said cutting teeth having a sharp cutting edge at the front thereof and having its body extending parallel to the axis of the tool on one side and inclined on the other side to accommodate the different pitches of the spiral grooves cut by said teeth, each of said teeth sloping downwardly toward the rear thereof.

9. In a rifling tool, the combination of a shank having a shoulder thereon, said shank having an oil passageway extending therethrough, a sleeve at the forward end of said shank, a circular cutting disk interposed between said sleeve and said shank, said cutting disk having a plurality of cutting teeth thereon, said sleeve having an annular channel therein connecting with the oil passageway, slots on the periphery of said sleeve extending outwardly across the end thereof, through each of which slots a jet of oil is projected outwardly along the teeth and against the chips cut thereby.

10. In a rifling tool, the combination of a shank, a shoulder on the forward end thereof, a stem extending forward centrally from said shoulder, a cutting disk carried on said stem, a sleeve on said stem resting against said cutting disk, a pilot on said stem having segmental shoes thereon, means for clamping said disk, sleeve, and pilot on said stem.

11. In a rifling tool, the combination of a shank, a shoulder on the forward end thereof, a stem extending forward centrally from said shoulder, a cutting disk carried on said stem and resting against said shoulder, a sleeve on said stem resting against said disk and means for clamping said sleeve and disk against the said shoulder.

12. In a rifling tool, the combination of a tool holder having a body, a shoulder on the forward end thereof, a stem extending forward centrally from said shoulder, a cutting disk carried on said stem and resting against said shoulder, a sleeve on said stem resting against said disk and means for clamping said sleeve and disk against said shoulder, said sleeve having an annular groove in the end thereof opening against the disk and a series of radial grooves on the end thereof.

13. A rifling tool comprising a circular cutting disk, said disk having cutting teeth integral therewith and distributed equally and continuously around the periphery thereof, one for each groove to be cut, a pilot mounted in advance of said disk with an open space between said pilot and the disk adapted to receive the chips from said cutter, said pilot

having radial open spaces therein through which the oil and chips can pass.

14. In a rifling tool, the combination of a shank having a large shoulder thereon, a stem extending forward centrally from said large shoulder and having a small shoulder on the end thereof, a cutting disk carried on said stem and resting against said shoulder, a sleeve on said stem interposed between said disk and said large shoulder, a sleeve on said stem beyond the disk and means for clamping said sleeves and disk on said stem.

15. A rifling tool comprising a cutting disk, a pilot on one side of said disk and a detachable guide on the other side of said disk, and means for holding the pilot, disk, and guide together and in correct alinement.

16. A rifling tool comprising a cutting disk, a pilot on one side of said disk and a detachable guide on the other side of said disk and means for holding the pilot, disk, and guide together and in correct alinement, said means permitting the removal of the cutting disk.

17. A rifling tool comprising a cutting disk, a pilot on one side of said disk, a guide on the other side of said disk, and means for holding the pilot, disk, and guide together and in correct alinement, said pilot being spaced apart from the disk with an open space between them.

18. A rifling tool comprising a cutting disk, a pilot on one side of said disk, a guide on the other side of said disk, and means for holding the pilot, disk, and guide together and in correct alinement, said pilot having openings, extending longitudinally therein to permit the flush of chips and oil therethrough.

In testimony whereof I affix my signature in the presence of two witnesses.

CARL G. ALLGRUNN.

IX. The invention as set forth in the patent in suit relates to tools for cutting the rifling grooves in gun barrels, and the claims which define the invention are directed both to the tools and their method of use.

The invention thus defined comprises the simultaneous cutting of all of the rifling grooves in a gun barrel, by forcing through the same a series of circular disks which have their periphery arranged in a toothlike formation corresponding to the number and arrangement of the rifling grooves.

The teeth of each succeeding disk are higher, so that each individual disk makes but a slight cut in the grooves (about two-thousandths of an inch), but when the entire series of

disks have been successively forced through the barrel, the rifling grooves are fully cut and complete.

The disks are removably held upon a tool holder by means of keys and a clamping nut, and after each disk has been forced through the gun barrel by the rifling bar the extremity of which carries the tool holder and associated disk, the disk is removed, the rifling bar withdrawn, the next larger disk clamped in place, and the operation repeated.

There is a pilot or guide member mounted in front of the disk, the diameter of which corresponds to the inside diameter of the gun barrel, and this cooperates with a guide sleeve carried on the tool holder at the rear of the disk, to properly center and guide the disk during its passage through the barrel.

The rifling bar is provided with a longitudinal spiral groove which engages a stationary pin, so that as the bar advances in its function of forcing the disks through the gun barrel the same is in addition rotated so as to give the proper or desired twist to the rifling grooves.

Suitable means are provided to supply and distribute lubricating oil just in front of the cutting edges of the disks during the cutting operation.

In carrying out the method of rifling as described and defined in patent in suit, the gun is properly lined up in the rifling machine, after which the smallest disk is clamped upon the tool holder, and is then forced through the gun barrel. As previously stated, this disk is then removed, the rifling bar withdrawn, and the next larger disk clamped in place. This process is repeated until the entire series of disks have been sequentially forced through the barrel and the rifling thus completed.

X. Plaintiff regarded the invention defined by the claims of the Allgrunn patent 1,311,107 as a trade secret, and subsequent and prior to the issuance of the secrecy orders by the Commissioner of Patents and the Federal Trade Commission made personally every possible effort to keep the invention secret.

Thanksgiving Day, 1917, was purposely selected for the first experimental test of the invention because no men were working on that day and the shop was unoccupied except for

five other members of the Symington-Anderson organization associated with the inventor in the experiment.

Charles H. Lynn, superintendent of the Symington-Anderson Company's gun shop, issued instructions to keep the invention secret.

Admission and control of visitors to the Symington-Anderson plant was under the supervision of the Government inspectors stationed at the plant by the War Department.

Plaintiff received requests for information as to his method of rifling but refused to disclose the same because of the secrecy orders.

Dwyer, a mechanical engineer of the Bullard Engineering Works, called at the Symington-Anderson Company in July, 1918, with the following letter of introduction:

JULY 16, 1918.

SYMINGTON & ANDERSON CO.,
Rochester, N. Y.

(Attention of manager.)

DEAR SIR: The bearer of this letter, Mr. W. S. Dwyer, our mechanical engineer, is calling upon you at the request of Major Hubbard, of the production section, with a view of investigating the merits of your method of rifling guns.

Any courtesies that you extend to him will be greatly appreciated by this company.

Very truly yours,
THE BULLARD ENGINEERING WORKS (INC.),
W. P. CLARK, *Works Manager.*

Permission to see the rifling apparatus was refused.

Plaintiff did not apply for foreign patents until the revocation of the secrecy order.

XI. Tender of the invention to the United States Government was made on August 17, 1918, by means of the following letter:

SECRETARY OF THE NAVY,
Washington, D. C.

DEAR SIR: In behalf of my clients, Carl G. Allgrunn and Frederick G. Lee, I hereby tender to you, for the use of the Government of the United States, its contractors and agents, the invention in rifling tool and method of using the same for rifling cannon set forth in an application filed in the U. S. Patent Office by Carl G. Allgrunn, the inventor, which

application was filed on February 23, 1918, and is serial number 218722. I inclose herewith a copy of the drawing and specifications of this application.

This tender is made in accordance with section 10–I of the act of Congress approved October 6, 1917, which act is known as the trading with the enemy act.

Mr. Allgrunn, the inventor, put this invention to use in the shop of the Symington-Anderson Co., of this city, several months ago, and has undertaken to keep this invention secret aside from such use, but my clients are informed and believe that said invention has leaked out and is now in use by the Wisconsin Gun Co., of Milwaukee, Wis., and perhaps by other manufacturers as well, all of whom are working on the manufacture of guns for the Army or Navy of the United States.

This tender is made so that my clients may hereafter, upon the issuance of the patent to them, sue for compensation in the Court of Claims, said right to compensation to begin from the date of the use of the invention by the Government, which we understand to mean used by the Government contractors as well.

Very truly yours,

(Signed) FRANK KEIPER.

XII. The common method of rifling field guns in use at the time plaintiff devised his method involved the use of a rifling head having adjustable cutters.

This structure comprised a cylindrical guiding body just a shade smaller than the bore of the gun and having its rear end adapted for attachment to the rifling bar.

Near the front end of the guiding body a plurality of adjustable cutters is mounted, these cutters being radially adjustable by means of certain mechanism. The number of cutters used was a fraction of the total number of grooves to be cut.

In using this structure the cutters are radially set or adjusted for the initial cut, and the structure is then forced through the gun by the rifling bar. The cutters are then radially contracted so that their cutting edges are withdrawn into the guiding body, and the same is returned to its initial position. The cutters are again expanded, this time a little further, and a second cut made. This operation is repeated until the set of grooves under formation have been completed, when the cutter head is indexed or rotated to the

proper position to cut the next set of grooves. When these are completed the indexing and cutting operation is again repeated, until all of the grooves have been cut.

XIII. The Allgrunn method of rifling resulted in a considerable saving of time over the previous method outlined in Finding XII.

Seven to ten 75-mm. guns could be rifled in a day of eight hours by the Allgrunn method, whereas it previously took 10 to 15 hours to rifle one 75-mm. gun by the former methods.

The use of labor possessing a high degree of skill such as was necessary with the former methods of rifling could be dispensed with due to the simplicity of the Allgrunn mechanism.

In the Symington-Anderson plant the labor cost of rifling the 75-mm. gun was reduced to 80 cents per gun.

XIV. Moving pictures were taken of the broaching apparatus while it was at work in the shop of the Bullard Engineering Works. The pictures were taken by a Navy officer and a marine officer. They spent about two hours photographing the broaching apparatus. They photographed the entire operation, beginning with cutter 35 until the gun was finished. They photographed the various operations at both ends. They also took photographs of the oil gushing onto the broaches outside of the gun so as to demonstrate that the broaches were well lubricated at all times.

XV. The French High Commission having expressed a desire to the Chief of Ordnance, U. S. A., to have an officer representing it visit the Symington-Anderson plant, permission was given by the following communication:

DECEMBER 10, 1918.

From: The Chief of Ordnance.
To: Mr. F. S. Noble, ordnance district chief, 82 N. St. Paul Street, Rochester, N. Y.
Subject: Visit by representative of French High Commission.

1. The French High Commission has expressed a desire to have an officer representing it visit the Symington-Anderson plant at Rochester, in order to study our methods of rifling, examine the machines used, and collect photographs and other documents pertaining to this process.

2. I have approved this request, and am anxious to have Major LeMoyne, who will represent the French High Commission, afforded every opportunity to get the information and make the studies, as contemplated. Major LeMoyne will be accompanied by Major A. E. Guy, of the Ordnance Department, and is expected to reach Rochester in the course of a few days.

3. Will you please communicate with the inspector of ordnance at the Symington-Anderson plant, apprising him of the contemplated visit, and its purpose.

C. C. WILLIAMS,
Maj. Gen., Chief of Ordnance, U. S. A.

SYMINGTON-ANDERSON COMPANY,
R. C. WATSON,
Army Inspector of Ordnance.
By T. H. COOK,
Asst. to Army Insp. of Ordnance.

Major LeMoyne, representing the French High Commission, accompanied by Major A. E. Guy, of the Ordnance Department, was sent to Rochester and admitted to the Symington-Anderson plant and allowed to see the broaching apparatus for rifling guns at the Symington-Anderson shop and to secure full data relating to the same in December, 1918, and plaintiff's permission was not asked for this disclosure.

XVI. (*a*) Subsequent to the development of the invention the Symington-Anderson Company used a process and tools for the rifling of guns similar to those defined by all the claims of Allgrunn patent 1311107.

(*b*) The Wisconsin Gun Company, of Milwaukee, Wisconsin, planned a set of broaching tools at a conference on or about April 14 or 15, 1918. An order was placed in the shop for the construction of these tools on April 16, 1918, and the same were completed about May 25, 1918. Subsequent to this date the Wisconsin Gun Company, without the license or consent of the plaintiff, used a process and tools for the rifling of guns similar to those defined by claims 1 to 6, 11, and 15 to 18, inclusive, of Allgrunn patent 1311107.

(*c*) Dwyer, a mechanical engineer and employee of the Bullard Engineering Works, of Bridgeport, Conn., went

to the Wisconsin Gun Company approximately July 15, 1918, to study their method of rifling and obtained drawings from them. Upon his return a set of broaching tools was made up and placed in use as soon as finished. Subsequent to this date the Bullard Engineering Works, without the license or consent of the plaintiff, used a process and tools for the rifling of guns similar to those defined by claims 1 to 6, 11, and 15 to 18, inclusive, of Allgrunn patent 1311107.

(*d*) About June or July, 1918, the Bethlehem Steel Company furnished drawings for a set of broaching tools to their employee, Kellow, a toolmaker. A set of tools was made from the drawings in about three weeks' time. Subsequent to this date the Bethlehem Steel Company, of Bethlehem, Pa., without the license or consent of the plaintiff, used a process and tools for the rifling of guns similar to those defined by claims 1 to 6 and 15 to 17 of Allgrunn patent 1311107.

XVII. (*a*) In 1917 and 1918 the Symington-Anderson Company contracted to manufacture 75-mm. guns for the Ordnance Department of the United States Army on a cost-plus-fixed-percentage basis, the Government agreeing to pay for the shop and equipment therefor. Time was stated to be an essence of the contract.

Certified copies of contracts between the Symington-Anderson Company and the United States of America (plaintiff's Exhibits 88 to 93, inclusive) are by reference made a part of this finding.

(*b*) In 1917 and 1918 the Wisconsin Gun Company contracted to manufacture 75-mm. guns for the Ordnance Department of the United States Army at its shop at Milwaukee, Wisconsin, on a cost-plus-fixed-percentage basis, the Government agreeing to pay for the shop and equipment therefor. Time was stated to be an essence of the contract.

Certified copies of contracts between the Wisconsin Gun Company and the United States of America (plaintiff's Exhibits 94 to 97, inclusive) are by reference made a part of this finding.

(*c*) In 1917 and 1918 the Bullard Engineering Works contracted to make 800 155-mm. guns for the Ordnance De-

partment, U. S. A. The contractor agreed to provide land, buildings, equipment in machine tools, etc., at cost of not to exceed $2,500,000, suitable for making 800 155-mm. guns, cost of buildings and equipment to be paid by the United States. Tne Government agreed to pay cost plus $1,000 profit for each gun, plus 33⅓ per cent of saving, as shown by difference between actual cost as compared with estimated cost. The Government paid for the buildings, machinery, and equipment.

The Bullard Engineering Works did not make the forgings for the guns, but the forgings were furnished to it from out of town, and the Bullard Engineering Works did the machine work on the forgings.

Time was stated to be an essence of the contract.

Certified copies of contracts between the Bullard Engineering Works and the United States of America (plaintiff's Exhibits 84 to 87, inclusive) are by reference made a part of this finding.

(*d*) The Bethlehem Steel Company on June 1, 1918, contracted to make 700 75-mm. guns, British model, 1917, and on August 6, 1918, contracted to make 400 75-mm. guns, British model 1917, at a fixed price, with a minimum profit of 10% guaranteed and a maximum profit limited to 20%.

Certified copies of contracts between the Bethlehem Steel Company and the United States of America (plaintiff's Exhibits 80 and 81) are by reference made a part of this finding.

XVIII. The plaintiff duly presented a claim before the War Department which was referred to the munitions patents board of the War and Navy Departments. This board passed favorably upon the claim and recommended an award to plaintiff of $33,172.00 for past use, which award was approved on June 23, 1920, by Benedict Crowell, Assistant Secretary of War, and notice of said award was given to plaintiff on June 23, 1920, and said award accepted by plaintiff on June 28, 1920, and voucher therefor was issued and payment thereon was promised forthwith, but the voucher was not paid, but was referred to the Auditor for the War Department and was disallowed on August 9, 1920, for the

following reasons, as stated by the auditor in the notice of disallowance:

"This claim arises under a contract created by operation of law, and is therefore not such as would come under the terms of the so-called Dent Act providing relief under contracts 'not executed in the manner prescribed by law.' The law creating the contractual relation between claimant and the United States also determines the method and tribunal in which just compensation for the taking or use of the invention is to be fixed, viz, the Court of Claims. (See acts of June 25, 1910, as amended by the act of July 1, 1918, 40 Stat. —, and the act of Oct. 6, 1917, 40 Stat. 394.) Until the Court of Claims has by a judgment fixed the rate of compensation due claimant and the Congress has appropriated for payment thereof the account officers have no authority to estimate and allow any amount not so liquidated. Said claim is therefore disallowed."

The report of the munitions patents board (plaintiff's Exhibit 14) is by reference made a part of this finding.

XIX. At the time Allgrunn devised his method and apparatus, as defined by the claims of patent 1311107, the following letters patent were in and a part of the prior art and are by reference made a part of this finding of fact:

U. S. patent to Gwynne, 33884, patented 1861.
U. S. patent to Bonzano, 37898, patented 1863.
U. S. patent to Morse, 284220, patented 1883.
U. S. patent to Streett, 318824, patented 1885.
U. S. patent to Newton, 582081, patented 1887.
U. S. patent to Torney, 1067285, patented 1913.
U. S. patent to Hanson, 1089376, patented 1914.
British patent to Smith, 21860, of 1903.
British patent to Jones, 10681, of 1907.

On June 28, 1917, there was filed in the U. S. Patent Office by Ernest Fuchs an application for "apparatus for use in calibrating and rifling the bore of firearms."

This application materialized into patent 1394079, issued October 18, 1921, which is by reference made a part of this finding of fact.

XX. About 1901 a steel miniature or model gun was constructed at the Washington Navy Yard. This model was rifled by means of a broaching cutter forced through the gun barrel by means of an arbor press. The broaching tool had a pilot and the full number of cutting teeth to correspond to the rifling.

Rearward extensions of the cutting teeth were in the form of spiral flutings by means of which a twist was given to the cutting teeth as they progressed through the barrel.

The rifling, which was for appearances, instead of its customary function, was completed by a single passage of the broaching tool through the gun barrel.

The broaching tool was used once and was then discarded and abandoned.

The miniature gun (defendant's Exhibit 3) and the fluted broach used to rifle the same (defendant's Exhibit 1) are by reference made a part of this finding.

XXI. In 1913 the Bethlehem Steel Company constructed a miniature or model steel gun, which is a one-eighth size model of a 6-inch naval gun. The rifling was simulated by cutting a series of spiral grooves in the barrel. These grooves were cut by means of a series of 8 cutters of progressively increasing diameter. The smallest cutter was fastened on the end of a bar having a spiral twist in the same, in order to give the same the necessary twisting motion in its passage through the barrel of the gun. The testimony is not clear as to the specific structure or method of mounting the cutters on the end of the rifling bar.

The first cutter was pulled through the barrel, removed, the second cutter of the series substituted, and a second cut made, this process continuing until the entire series of cutters were passed through the barrel.

During the cutting operation lubrication was applied by means of a hand squirt gun.

The periphery of the cutters had as many teeth as the number of grooves desired. The teeth were equally distributed around the periphery. Each of the teeth had a sharp cutting edge at the front with its body inclined on one side. No satisfactory evidence exists as to the exact

angle the other side of the tooth made with the axis of the cutter.

This set of broaching tools was used but once, this being in connection with the aforesaid model gun, and was then discarded and abandoned.

The model gun (defendant's Exhibit 52) and the set of broaches (defendant's Exhibit 53) are by reference made a part of this finding.

XXII. About the year 1910 the Bethlehem Steel Co. manufactured and delivered six 1-inch guns on order of the Turkish Government.

These guns were rifled by a series of broaches or cutters of progressively increasing size or diameter.

The structure of the cutters and the apparatus in which they were used is shown in defendant's Exhibit 58, a drawing made from memory or recollection by Fred Feilbach, who was in charge of tools at the Bethlehem shops. This drawing was made in 1920 at the request of counsel for defendant and is by reference made a part of this finding.

This drawing discloses a structure comprising a rifling bar upon which a series of cutters may be placed together with a pilot and retaining nut.

The operation was presumably as follows:

The gun to be rifled having been placed in the rifling machine and the rifling tool affixed to the end of the rifling bar in the customary manner, the smallest of the series of cutters was placed thereon, followed by the removable pilot and retaining nut, and was drawn through the gun. Then the nut and pilot and cutter were removed, the rifling tool without the cutter drawn back through the gun, the next larger cutter of the series placed upon the head, followed by the pilot and retaining nut, and the cutting operation repeated. All 12 cutters were used, one after the other, in this manner in the rifling of each gun.

During the cutting strokes lubricant was supplied to the cutting teeth from an external source leading to channels through the body of the rifling tool, which terminated in radial openings directly in front of the teeth.

Upon completion of the six guns the apparatus and cutters were discarded and abandoned, and have been lost or destroyed.

Defendant has introduced an Exhibit 69, by reference made a part of this finding, which purports to be a piece cut off from the end of one of the guns during the finishing operation. This piece shows six rifling grooves.

Defendant has also introduced as Exhibit 59, by reference made a part of this finding, a 10-groove cutter stated to be cutter #3 of a series designed to rifle the aforesaid guns, before the design of the rifling was changed from ten to six grooves. This cutter, which was never used, can be readily inserted into Exhibit 69 with a clearance of a few thousandths of an inch.

The teeth of the cutter (defendant's Exhibit 59) have both of their lateral sides at an angle to the axis of the cutter, this angle being apparently the same for each side.

The court decided that plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

This is a patent case. The findings are quite voluminous and the case, notwithstanding the abnormal size of the record, not especially involved from the standpoint of facts.

The plaintiff is a skilled machinist; for over sixteen years he occupied a responsible position with the Bethlehem Steel Company in its gunshop department and had personal charge of tool making, sights, rifle heads, etc. In June, 1917, plaintiff became superintendent of the gun-finishing department of the Symington-Anderson Company, of Rochester, New York. This company was at the time engaged in manufacturing guns for the Government. Time was an essential factor in completing manufacture. The plaintiff conceived the idea of inventing a tool which would facilitate the performance of the " rifling operation," one which would not only improve upon the process then in vogue by way of accuracy but accomplish the purpose in much less time at decreased expense. The plaintiff disclosed his drawings

of the tool to another employee of the company and to Mr. Anderson, who was so impressed with its utility that he authorized an expenditure of $500 of the funds of the company to develop the invention. These events happened in July, 1917. On Thanksgiving Day, 1917, the tool was put through a practical test in the Symington-Anderson Company's plant in the presence of five members of the company, was found to be operative, and with a few additional perfecting alterations was finally put in use about February 1, 1918. Thereafter all the guns manufactured by the Symington-Anderson Company were rifled by this or substantially identical tools, and both the process and tool met the expectations of the inventor.

On February 23, 1918, the plaintiff filed his application for a patent for the tool and process of use. This was done at the instance and request of Mr. Anderson, who positively disavowed any claim upon or right to use the invention. As a matter of fact, the Symington-Anderson Company preferred no claim of license to use the tool or process.

At the time of filing the application for patent the applicant accompanied the same with a request to the commissioner to make it special. This request was predicated upon existing war conditions and the value of the tool and process. The commissioner refused to accede to the request. On June 29, 1918, the commissioner rejected all the submitted claims of the patentee, and followed his action on July 2, 1918, with a written injunction of secrecy upon the applicant. The commissioner's secrecy order was promulgated under the act of October 6, 1917, and recited, among other things, "that your application as above identified has been found to contain subject matter which might be detrimental to public safety or assist the enemy in this present war, and you are hereby ordered to in no wise publish the invention or disclose the subject matter of said application, except that the invention may be disclosed to officials of the War and Navy Departments, but to keep the same secret during the period of the present war."

The secrecy order of the commissioner was followed by a similar one from the Federal Trade Commission on July 2, 1918.

August 18, 1918, the commissioner, upon the application of the plaintiff, authorized the use of the invention in the plants of the Symington-Anderson and Wisconsin Gun Companies. September 27, 1918, the plaintiff filed with the commissioner an amendment of his claims, supported by an argument as to their validity. On November 2, 1918, the commissioner, by an office action of that day, stated that plaintiff's claims 1, 4, 10 to 14, and 17 to 18 were allowable in substance, the others being rejected. The plaintiff on November 8, 1918, responded with additional amendments and arguments. December 9, 1918, the War Department sought to intervene by filing with the commissioner a petition asking permission to take testimony to establish prior public use of the invention, and thus defeat plaintiff's application. The commissioner did not rule upon the petition of the War Department immediately; instead, he did on December 10, 1918, rescind his previous order of secrecy, the Federal Trade Commission doing likewise on April 15, 1919. The commissioner finally decided the War Department's petition in favor of the plaintiff May 29, 1919, and passed his application to patent June 27, 1919, issuing letters patent thereon No. 1311107 on July 22, 1919.

On August 17, 1918, the plaintiff, through his attorney, tendered the invention to the Government. (See Finding XI.)

It is conceded by the defendant that the invention was used by the Symington-Anderson Company, the Wisconsin Gun Company, the Bullard Engineering Works, and the Bethlehem Steel Company. We think the concession is manifest; if not so, the proof establishes the facts indisputably.

We have recited in chronological order the facts covering the conception of the patent, its development, and the relationship of the patentee to the Government during the period involved, assuming for the instant the validity of the patent and its use by the Government. This has been done as a matter of first importance, made so by a defense advanced that under the present record the plaintiff has not established his compliance with the provisions of the act of

October 6, 1917, and the trading with the enemy act. The act of October 6, 1917 (40 Stat. 394), reads as follows:

"An Act To prevent the publication of inventions by the grant of patents that might be detrimental to the public safety or convey useful information to the enemy, to stimulate invention, and provide adequate protection to owners of patents, and for other purposes

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whenever during a time when the United States is at war the publication of an invention by the granting of a patent might, in the opinion of the Commissioner of Patents, be detrimental to the public safety or defense or might assist the enemy or endanger the successful prosecution of the war, he may order that the invention be kept secret and withhold the grant of a patent until the termination of the war: *Provided*, That the invention disclosed in the application for said patent may be held abandoned upon it being established before or by the commissioner that in violation of said order said invention has been published or that an application for a patent therefor has been filed in a foreign country by the inventor or his assigns or legal representatives, without the consent or approval of the Commissioner of Patents, or under a license of the Secretary of Commerce as provided by law.

"When an applicant whose patent is withheld as herein provided and who faithfully obeys the order of the Commissioner of Patents above referred to shall tender his invention to the Government of the United States for its use, he shall, if and when he ultimately received a patent, have the right to sue for compensation in the Court of Claims, such right to compensation to begin from the date of the use of the invention by the Government."

While the applicable portions of the trading with the enemy act are not essentially different from the foregoing statute, we think it necessary to quote section 10 (i) (40 Stat. 422), providing as follows:

"Whenever the publication of an invention by the granting of a patent may, in the opinion of the President, be detrimental to the public safety or defense, or may assist the enemy or endanger the successful prosecution of the war, he may order that the invention be kept secret and withhold the grant of a patent until the end of the war: *Provided*, That the invention disclosed in the application for said patent may be held abandoned upon it being established

before or by the Commissioner of Patents that, in violation of said order, said invention has been published or that an application for a patent therefor has been filed in any other country, by the inventor or his assigns or legal representatives, without the consent or approval of the commissioner or under a license of the President.

"When an applicant whose patent is withheld as herein provided and who faithfully obeys the order of the President above referred to shall tender his invention to the Government of the United States for its use, he shall, if he ultimately receives a patent, have the right to sue for compensation in the Court of Claims, such right to compensation to begin from the date of the use of the invention by the Government."

The defendant's analysis and construction of the statutes are confined to the strict meaning of the language employed. The court is advised that jurisdiction is a subject of strict construction, and under the provisions of the jurisdictional acts it is clear that Congress did not extend relief to anyone save a patentee, and that the clause "when an applicant whose patent is withheld" clearly means the suspension of an allowed application for a patent, the claim being made and insisted upon that the plaintiff herein had no more than a pending application for a patent which had not and did not reach the point of allowance, was in no condition to be allowed, until subsequent to the lifting of the commissioner's secrecy order, and hence it was impossible for, and the commissioner did not, withhold a patent. We need but mention that the statutes are intended as remedial ones in so far as the present cause of action is concerned. Congress under existing conditions was invading temporarily an established property right, and withholding from a class of inventors a statutory privilege of value, and unless it may be concluded from the enactments as a whole, together with the circumstances under which they were passed, that no inventor, save one who was entitled to a grant of a patent during the emergency, came within the laws the contention is unsound. The title of the act of October 6, 1917, discloses an intent to stimulate invention and afford protection to owners of patents. The provisions of the acts are in keeping with that purpose, and

the language employed in the first paragraph confers authority to *withhold* a *grant* of a *patent* until the war is over. Patents are of course granted or refused upon the inventor's application for a patent. From the application the commissioner obtains the information upon which the secrecy order is or is not to issue; he is not required by any provision of the statute to wait until he ascertains the issue of patentability before he enjoins secrecy. In this case he did not wait, but notwithstanding his rejection of all of the plaintiff's first claims immediately warned the inventor to keep his invention secret and pointed out to him the consequences of disobedience of the order. It is the subject matter of the *invention* toward which the secrecy order is directed, a subject matter found in the application, and which but for the passage of the acts in question would become public if a patent were granted, that Congress was seeking to conserve for the exclusive benefit of the Government in time of war.

The legislation accomplished a radical change in patent procedure, and substituting for the established practice a different course in procedure gave to the commissioner the right to suspend, to hold in abeyance, the granting of a patent until the emergency ceased to exist. This, we think, is demonstrated by the provision in the act of October 6, 1917, which says: "If and when he ultimately receives a patent," language repeated almost *in hæc verba* in the trading with the enemy act. This, we think, is a clear recognition of the right of an inventor subjected to the provisions of the act when his application is filed, to have a cause of action against the United States, if after tender of the invention the United States uses it, prior to the grant of a patent, when the same is *ultimately* granted. By force of the acts the inventor parts with an immediate right to apply for a foreign patent, loses the privilege of selling a trade secret, and gains the right to sue the United States for the use of an invention, if the application therefor ripens into a patent, a right the inventor would not have without the enabling provisions of this war legislation. To hold otherwise would be equivalent to ascribing to Congress an intent to discourage rather than

stimulate invention. Congress was conferring upon the commissioner a discretionary power, exercisable upon the ascertainment from the inventor's application for a patent whether the subject matter of the invention was such as to afford aid to the Government's enemies. If he so found, and enjoined secrecy, the inventor was severely penalized if he failed to observe the inhibition. Manifestly, if the disclosures of the application for patent lacked novelty and invention, the applicant lost nothing; if, on the other hand, a grant of a patent followed, the inventor lost no rights by reason of the secrecy order and the withholding of letters patent. The commissioner's administration of the law was in harmony with this construction, and he set up a committee, aided by the advice of Army and Navy officers, to whom applications for patents were submitted, and upon whose judgment he relied in issuing secrecy orders prior to examination as to patentability. (See amendment to rule 15 of practice of the Patent Office, set out in Finding VIII.)

It is next contended that the plaintiff did not observe the secrecy order, but on the contrary made his invention public. If this fact is established it is fatal to a recovery; at least this court has so held in the *Zeidler case*, 61 C. Cls. 537. The secrecy order was issued July 2, 1918; prior to this date, as the findings show, the invention, with the knowledge and acquiescence of plaintiff, was used in the Symington-Anderson plant where the plaintiff was employed, and was known to the persons who were present on Thanksgiving Day, 1917, and to the workmen in the plant engaged in rifling guns, as well as to the Army inspectors stationed at the plant to inspect the finished guns. As a matter of fact, the invention was continuously used at the above plant, both before and after the permission to so use it was granted by the commissioner. The above use, we think, is covered by the commissioner's permission to so use issued August 18, 1918. (See Finding VIII.) Permission was also granted for the use of the invention by the Wisconsin Gun Company on the same day and the plaintiff was authorized to disclose the invention to officers of the Army and Navy. The plaintiff himself, as the record establishes, did not disclose the invention pub-

licly; he did disclose it to his employers, but aside from this he made in good faith an effort to maintain secrecy. The first experimental test of the invention was conducted on Thanksgiving Day, 1917, a national holiday, when the plant of his employers was closed to all except the plaintiff, Mr. Anderson, and such employees as were essential to conduct the test. The superintendent of the Symington-Anderson plant issued orders to keep the invention a secret. The plaintiff absolutely declined to accede to requests for a disclosure of the invention, and there is nothing in the record which in any way connects the plaintiff with a publication of the invention. On the contrary, he filed his application for a patent promptly after the operativeness of the device was demonstrated. On February 23, 1918, he petitioned for special consideration of the same, and when after the issuance of the secrecy order he discovered others than the Symington-Anderson Company using his invention, he called it to the attention of the Government officials. (See Findings VII and XI.) The plaintiff did not apply for a foreign patent, nor did he attempt to realize profit from the device as a trade secret. The Symington-Anderson Company had a shop license to use the device, and plaintiff was in no position to forestall them; nevertheless the company cooperated with him in this regard.

Knowledge of the patent did obtain prior to the secrecy order. The Wisconsin Gun Company, the Bullard Engineering Works, and the Bethlehem Steel Company obtained it and used the device, but nowhere does it appear that the plaintiff was responsible for the use. When the existing situation is taken into account it is not difficult to ascertain the source of knowledge as to the invention, entirely aside from the inventor revealing anything about it. The invention was a valuable acquisition for gunmakers, and its use, both permissive and otherwise in the Symington-Anderson plant, necessarily opened an opportunity for knowledge concerning it. Government inspectors, Army and Navy officers, were, under the contracts to manufacture guns, constantly present in the gunmakers' plants; workmen were, of course, familiar with the invention, and it is obvious that under the

necessities of the case the invention and its worth would leak out. This is signally illustrated by a letter dated July 16, 1918 (Finding X), in which a major of the Army requests the Symington-Anderson Company to disclose the invention to a mechanical engineer of the Bullard Engineering Works, a request which was promptly refused. It is not always difficult to draw inferences from events, but we have been unable to find from the record that the plaintiff failed to obey the secrecy order. For the incidental publicity resulting from use in the Government service we think the plaintiff is irresponsible. We think there is a marked difference between this case and the *Zeidler case*, *supra*. Zeidler made no efforts toward secrecy; he realized profit from the start; devices embodying his invention were sold in large quantities. Here the inventor never resorted to a similar practice.

The patent in suit is described in detail in Finding IX. The novelty of the tool as abstracted from the claims resides in its ability to simultaneously cut the rifling grooves in the barrel of a gun by forcing through it one at a time a series of circular disks having their periphery arranged in tooth-like formation, and of such proportions as to correspond to the desired rifling grooves. This is accomplished by utilizing first a disk so constructed as to make a slight cut and following this operation by a series of additional disks, each one of which in order makes a slightly deeper cut, until the desired rifling is completed. It is a graduated process, each disk so constructed as to penetrate deeper into the barrel of the gun until the desired grooving or rifling of the same is attained. The various disks are constructed for interchangeable yet precise mounting on a tool holder, easily removable after they have been forced one at a time through the gun barrel by the rifling bar. By thus utilizing them one at a time, cooling of the interior of the gun barrel between cuts is permitted, which would not be the case in certain of the prior art structures in which the use of a tool having an integral series of cutting disks of increasing diameter is suggested. There is a pilot or guard member mounted in front of the disk, which cooperates with a guide

sleeve at the rear of the disk in order to maintain even stability and guide the disk during its course through the gun. The rifling bar, an indispensable element of the tool and process, was so constructed as to provide for rotation to the desired twist as it was forced through the gun barrel and suitable methods of lubrication in front of the cutting disks obtained. The tool and process resulted in a pronounced acceleration of the rifling process, and did in fact revolutionize the operative devices then in use. It likewise made available a means of effectually removing the "shavings" due to cuttings, a source of trouble theretofore. The record sustains the fact that previous to the patent in suit the rifling of guns had been from an early date accomplished by what is termed "the adjustable cutter type of head," a machine described in Finding XII. Without going into its detail of construction, we think it sufficient to state that the plaintiff's tool and process, known as "the broaching type of head," was so far superior to the old type that it at once superseded it and found immediate and practically universal use, as well as commercial value. The old type involved a multiplicity of operations, did not as successfully overcome the removal of "shavings," and consumed a longer time, as well as additional labor, to accomplish the purpose.

The plaintiff's rifling head is an ingenious device; it combines the essential functioning elements in a way that has not been done before, and as to method of operation introduces for the first time successfully the accomplishment of rifling a gun barrel by forcing through one at a time the cutting disks. The importance and value of the result are not to be minimized. By the use of plaintiff's device and method unskilled labor was made available; time was conserved and expense greatly reduced. What, however, is of still greater importance was the attainment of accuracy in producing rifling grooves.

The defendant does not seriously dispute the value of plaintiff's tool and method. That it was generally adopted and used is indisputable. Prior use of a similar device is relied upon as anticipatory of the plaintiff's invention. The difficulty with the citations of prior use offered is that, apart

from essential differences of construction, which are manifest, two of the tools were used but a single time and thereafter abandoned. As appears from Findings XX and XXI, some time in 1901 the Washington Navy Yard constructed a miniature model gun, an exhibit in the case, and the gun barrel was rifled by a tool possessing some of the elements utilized by the plaintiff. The rifling was for appearances only, was completed by a single passage of the tool through the gun barrel, and was never thereafter used at all. In 1913 the Bethlehem Steel Company did almost precisely the same thing. It would be idle to contend that the "broaching heads" used upon these occasions in a small model gun anticipated the patent in suit; they were obviously employed to simulate real rifling in a full-sized gun, without either thought or interest in the attainment of the real purpose of effective rifling in operative guns, and never resorted to thereafter. Whatever may have been their value in substantial gun manufacture was lost to the art by abandonment, and the proof fails to sustain their use as an actual experiment. It was no more than a mere casual mechanism designed to accomplish the single purpose in hand, and subsequently discarded. (See Robinson on Patents, Vol. III, foot of page 271.) The same observations apply to the use made of the broaching head employed by the Bethlehem Steel Company in 1910 (Finding XXII), with the additional weighty fact that the drawing relied upon to disclose constructional features was made in 1920 from memory. Six guns were rifled by this alleged method and with the tool described; no subsequent use is shown and no claim is made of any subsequent use whatever.

Ten prior-art patents are cited as anticipatory; from them the defendant deduces a defense that the construction of the tool and the conception of the method for its use did not involve invention and was no more than the employment of mechanical skill. The art as demonstrated by its history involved certain fundamental necessities to meet which required the employment, in combination, of elements whose functioning capacity was well known and firmly established. It, of course, did not require the exercise of

invention to employ blades to cut; to observe the necessity for a partial twisting movement in projecting them through the barrel of the gun; to overcome the heat generations of friction, etc., etc.; everyone skilled in the art recognized the existence of all these difficulties in the rifling process. The problem to be solved was to combine into a workable mechanism these various instrumentalities at the command of the inventor and utilize their functioning capacity to accomplish in an effective way what the art demanded. The rifling of a gun barrel, as previously observed, was an exacting operation; rifling grooves are fixed with acute nicety; their dimensions and depth must accord with the charge to be discharged from the gun, and, as the art discloses, inventors for a long period of time were centering their attention upon the construction of a tool and method to do this identical thing. It is difficult in many instances to distinguish between mechanical skill and invention, but we are impressed here with the fact that the plaintiff did bring into existence a device, a tool as it is termed, which for the first time assembled into a mechanism each of the elements necessary to accomplish rifling in a decidedly new and novel way. The plaintiff's invention overcame with success the disposition of troublesome shavings; it provided a new method of lubrication; it furnished a period of cooling time for heat generated by friction incident to incisions in hard metal; it attained accuracy; it greatly facilitated the operation; reduced expense, and constructed a tool which could be operated by unskilled labor; all this and perhaps more was the result of the plaintiff's conception. This, we think, required more than mechanical skill; it goes beyond a mere joining of elements old in the art, to do what everybody in the art knows they will do in an imitative effort, and involves a concept, creative genius, and the utilization of old elements in a new combination which obliges them to function in an entirely new and novel way to accomplish the difficulties towards which the invention is directed. (Robinson on Patents, Vol. I, section 78, and succeeding sections.)

We have said the foregoing for the reason that the prior art cited as anticipatory is "spotty"; no single citation

embraces plaintiff's conception or tool. Each citation exhibits some single element of the invention in suit, an element recognizable as indispensable in any device, but there exists no suggestion that previous inventors comprehended the possibility of doing what the plaintiff did do. Aside from the crudeness of some of the inventions, it is apparent from the record that no one citation relied upon found a favorable reception in the art, or attained a degree of recognition commensurate with the plaintiff's patent. No similar tool complete in all its parts appears. As a matter of proven fact, the invention in suit was the first in the field capable of rifling the barrel of a gun in the manner and under the conditions the art had been struggling to attain. The case in this respect, we think, falls within the decision of the Supreme Court in *Parks* v. *Booth*, 102 U. S. 96, and *United States* v. *Bethlehem Steel Co.*, 258 U. S. 321.

The Supreme Court in the case of the *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, had before it a patent case similar to the one in suit. In disposing of a contention made by the defendant that what the patentee did was merely the exercising of mechanical skill and not invention, the Chief Justice said:

"It is argued, on behalf of the United States, that Lenke's invention was unpatentable because it embodied nothing more than a natural and normal modification of existing ideas. Such modifications and their advantage were all very clear after the fact; but the old beams had been in use for a number of years and a heavy weight of metal had been used when, by Lenke's device, it was cut down two-thirds. Lenke's cargo beam almost universally superseded the old one. The United States used it and it was installed in nearly every pier in the country. No one else had foreseen its advantage. Lenke offered it as a solution of the problem at a minimum cost with a maximum efficiency. The United States conceded in the Court of Claims that Lenke's patent was novel in the sense that there was nothing in the prior art exactly like it, and that it was useful. While thus, in a way, he improved an existing idea, he developed a new idea."

We think this quotation is applicable not alone upon this one subject but that the opinion from which it is quoted applies generally to the question of invention in this case.

We have set forth the prior-art citations relied upon in the findings, and think it hardly necessary to review each one in detail. The invention, in our opinion, comes within the principle of patent law stated by the Supreme Court in the case of *Loom Co.* v. *Higgins*, 105 U. S. 580. In this case the court said:

"It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It was certainly a new and useful result to make a loom produce fifty yards a day when it never before had produced more than forty; and we think that the combination of elements by which this was effected, even if those elements were separately known before, was invention sufficient to form the basis of a patent."

August 17, 1918, the plaintiff's attorney addressed to the Secretary of the Navy the letter appearing in Finding XI. The defendant, construing the act of October 6, 1917, literally asserts that this communication is valueless as a tender for use, first, because it is not in accord with the terms of the act; and, secondly, the record does not disclose that the use which followed was the direct result of the tender or a use by the United States. As to the first contention the second paragraph of the statute does use the words, "When an applicant whose patent is withheld as herein provided." This sentence standing alone would support the argument advanced. The plaintiff's application had not then been granted; nevertheless, as we have previously observed, we think this is too narrow a construction of the statute. Congress was not primarily concerned in affording protection to an inventor whose application had passed to issue; the context of the statute as a whole negatives this intent. The act afforded relief to inventors whose right to a grant of patent was suspended and had no intention to restrict the right to sue for compensation to those who had procured a grant of a patent. To so hold would limit the benefits of the act to that class of applicants who had been fortunate enough to have their applications, filed during the period, immediately considered and passed to issue, and leave without relief the

more numerous class whose applications were necessarily delayed or retarded by the many obstacles which may interfere to prevent immediate grants, as well as to ignore the congestion obtaining in the Patent Office during this period. It seems clear to us that Congress by inserting the words "whose patent is withheld" used the word "patent" as synonymous with invention, i. e., whose grant is withheld, and did not mean to exclude an applicant whose right to a patent was a matter of future determination. The report of the Senate Committee on Patents clearly indicates that Congress intended to compensate inventors for the use of their inventions during the war. (Senate Report No. 119, 65th Cong., 1st sess.)

As a matter of proven fact the plaintiff's patent in the common acceptation of patent practice was withheld, for on November 2, 1918, the commissioner advised him that claims 1, 4, 10 to 14, and 17 to 18 were allowable in substance, and these claims with some additional amendments finally passed to patent June 27, 1919. The purpose of a tender for use by the Government is obvious. Notice of the inventor's application and claims afforded the Government opportunity to use the invention or refuse its use, but, says the defendant, the use in this case was not *by* the United States, nor did it follow as a consequence of the tender. Its use, it is said, was but the continuation of the use of an unpatented suggestion already known and in use by Government contractors. The terms of the act of October 6, 1917, providing for compensation for use, are comprehensive, "such right to compensation to begin from the date of the use of the invention by the Government." Let us take the record in this case in this respect. Secrecy is enjoined upon the patentee. We have found the secrecy order to have been observed. The patentee discovers that his invention has become known to and is in use by Government contractors other than those who have permission to use it; he at once notifies the Government of this use and at the same time tenders his invention for use. The Government contractors thereafter continued the use of the invention

Surely opportunity was afforded the Government by the tender to discontinue its use. It was but a formal matter for the Government to notify the contractors of plaintiff's tender and claims. On the contrary, with full knowledge of the situation the Government at no time did more than to attempt after use to prevent the granting of plaintiff's patent. The officers of the Government knew the law and were conscious of the legal consequences of using the invention if they continued to use it. What were those consequences? One at least was a liability to compensate the patentee for the use of his invention from the *date of the use.* The Government may not disclaim knowledge of the invention, nor of the plaintiff's future intention to seek compensation. The plaintiff had permission to use the invention and disclose it to his employers and one other company. Therefore it seems to us that the unauthorized use preceding the tender, if continued after the tender, brings the plaintiff within the relief intended by the act.

The final defense upon the issue of user is, indeed, more troublesome. The defendant contends that the use of an invention or, as we may say in this case, an incomplete patent by an independent contractor, of his own volition, without any requirement upon the part of the Government to use the invention, entails no liability upon the Government to pay for such use. In the contracts involved in this case there are no provisions requiring the contractors to use this or any other patented device. The contractor was at liberty to choose his method of rifling the guns, and beyond peradventure there was available another method by which rifling could be successfully accomplished. So that in its final analysis the defense is made to rest upon the proposition that the *use* in this *case* was *for* and not *by* the United States, as the act contemplated, and that the use was not required of the contractors by the United States. An independent contractor under no contractual obligations to use a specific patented device may not in his agreement with the United States relieve himself from liability as an infringer of a patent because of this contractual relationship.

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Cramp case, 246 U. S. 28. The plaintiff predicates his right of recovery upon the peculiar character of the contracts in the case and insists that a cost-plus contract, such as were the contracts here involved, entitles him to invoke the principle "*facit per alium facit per se*." The contracts with the Symington-Anderson Company, the Wisconsin Gun Company, and the Bullard Engineering Works, all substantially similar, obligated the Government to pay for the plant, equipment, materials, and tools, up to a stated amount, the contractors to be rewarded upon a fixed-profit basis, except the Bullard Engineering Works, in which case the compensation was fixed at cost, plus $1,000 for each gun. There were many such contracts entered into during the war, and in the contracts to which this controversy is addressed the inducement to undertake the enterprise was quite complete and generous. In the case of the Bethlehem Steel Company no such financial provisions obtained. It was a distinct cost-plus contract. If, of course, the contractors were agents of the Government, this phase of the contention would be free from difficulty. However, we are not prepared to hold that the financing of an undertaking wherein the contractor obligates himself to manufacture a specific thing, makes him, under the provisions of the contracts here involved, an agent of the Government to the extent at least of holding the Government responsible for the use of a patent which the contractor was at liberty to use or not to use, as his judgment dictated.

In so far as the contractor and the Government are concerned, two stipulations in the contracts absolved the Government from any liability for the unauthorized use of a patent by the contractor. The plaintiff, however, in addition to the above contention, insists that, as a proposition of law, compensation for use follows from the use by the contractor of the patent in suit, with the knowledge and acquiescence of the Government, and fortifies this contention with a statement that the record shows that the authorized Government officers in charge of the contract knew of the use made of the invention, not only acquiesced therein but encouraged its use, recommended to all the contractors

that it be used; that the Government purchased the material from which the tools were made, paid for the guns in which it was used, and now owns as salvage from the plant and equipment the tools which were so used. While the question is not free from doubt, we are inclined toward the opinion that the argument is tenable. The contracts contained numerous provisions under which the Government inspectors, through the Chief of Ordnance, were clothed with plenary authority to reject any unsatisfactory detail of manufacture, and the contractors' compensation was dependent upon the guns meeting inspection. Not only was this supervisory authority exercised to the limit, but the plants of the contractors were closed to visitors, except upon permission of the War Department. Time was a most important factor, made so in the contracts; all allowable haste was important; the need for ordnance was acute, and, we think, the inspectors and those in authority were more than pleased with the advent of plaintiff's tool and process. The inspectors could not escape knowledge of use; they were present from day to day and observed the process of manufacture. The Chief of Ordnance, on December 10, 1918, granted written permission to the French High Commission, then in this country, to acquire information as to and afford aid in gunmaking, to visit the Symington-Anderson plant and inspect the method of rifling employed. The first paragraph of the permit, after reciting a request therefor, used this most significant language, two words of which we italicize: "In order to study *our methods* of rifling, examine the machines used, and collect photographs and other documents pertaining to this process." We find nothing in the record indicating a lack of knowledge or acquiescence in the use of the invention for the Government by the contractors; in fact, no claim of ignorance in this respect is made. When the Government sought to forestall the granting of a patent, as it did on December 9, 1918, prior public use and no other cause was assigned as a lawful reason for withholding the grant.

We have been unable to find a decisive precedent supporting the plaintiff's contention. The nearest approach to

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the issue, in cases cited in the briefs, is found in the case of *United States* v. *Harvey Steel Co.*, 227 U. S. 165, 172. In disposing of this case the court said:

"The unsoundness of the remaining contention becomes apparent from its mere statement. The proposition is that even although the armor plate made for the United States by the Midvale Steel Company was hardened by the Harvey process, the obligation to pay royalty as to such armor does not exist because the United States had not by its contracts with the Midvale Company specifically required that company to use the Harvey process. But under the terms of two of the contracts with the Midvale Company that company was permitted to use the Harvey process if desired, while under the other contracts the process used was required to be satisfactory to the Navy Department, and under all the contracts the United States had the right to inspect the process used."

In *Wood* v. *Atlantic Gulf & Pacific Co.*, 296 Fed. 718, 722, 723, the district court, in refusing to modify an injunction at the request of an infringer, a motion so to do being predicated upon a partial use by the Government under the acts of June 5, 1910, and July 1, 1918, said:

"When the Government knows and obliges the contractor to use the patented article, of course the Government should be willing to pay; but it will be going entirely too far to say that, because any independent contractor for his own convenience saw fit to use the patented article in doing Government work, the Government should pay for such use by him, when they did not know he was using it.

* * * * * * *

"The same analysis of this language shows with the same conclusiveness that it does not indicate the use by an independent contractor in doing the work for the United States, where such use was not with the knowledge or by the requirements of the United States. I am therefore of the opinion that, if the facts before the commissioner show that this defendant had a contract which required certain dredging operations to be done by it for the United States, without further showing that the United States either required the use by the contractor of the Wood runner, or had knowledge that the Wood runner was to be used or was being used by defendant in doing this dredging operation, the act does not affect such use, and the commissioner will proceed just the same as if the act had never been passed."

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The construction of the act of July 1, 1918, by the Supreme Court in the *Richmond Screw Anchor case*, *supra*, discloses the intent of Congress in affording relief to patentees for the use of their inventions by contractors for the United States. We perceive no valid reason for ascribing to Congress a different intent in the passage of a war measure obviously enacted to cover an existing situation, such a one as prevailed when the act of October 6, 1917, was passed. In extending relief to inventors whose inchoate right to a grant of patent precluded a cause of action for use of the same by the Government, Congress was not dealing in technicalities, nor intending to preclude a cause of action if the Government knew, consented, and profited by the use for it of an invention under the circumstances fixed in the act.

The use of the plaintiff's invention was indeed beneficial to the Government. It not only saved a most considerable sum of money on a cost-plus contract, but expedited the manufacture of guns, and accomplished what had never been accomplished before in a concededly efficient and perfect manner. For tools or mechanism to do this thing was in fact exactly what the War Department wanted, and the record sustains the fact that when it was found, the department, fully aware of its use, not only acquiesced in the same but encouraged it and in the end profited to a most considerable extent thereby. It is inconceivable that any other course would or could have been pursued.

The plaintiff may not recover for the use of his invention by the Symington-Anderson Company. This, we think, is apparent from the record and the decision of the Supreme Court in *Gill* v. *United States*, 160 U. S. 426, as well as numerous other precedents to the same effect, too many in fact to warrant citation.

There is no proof in the record upon which a judgment can be predicated for damages. The case will therefore be remanded in accordance with the stipulation of the parties for proof on damages. It is so ordered.

GREEN, *Judge;* and MOSS, *Judge*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

AUBURN RUBBER CO. v. THE UNITED STATES

[No. H-433. Decided February 4, 1929]

On the Proofs

Excise taxes; pneumatic tire blow-out patches and relinings.—Plaintiff's product, used to repair and prolong the life of pneumatic tires, is not taxable under section 900 of the revenue act of 1921 and section 600, revenue act of 1924. See *National Rubber Filler Co.* v. *United States*, 63 C. Cls. 337.

The Reporter's statement of the case:

Mr. Alex Koplin for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The Auburn Rubber Company, during the times hereinafter mentioned, was and now is a corporation organized, existing, and operating under and by virtue of the laws of the State of Indiana, with its principal place of business located at Auburn, Indiana.

II. The product manufactured and sold by plaintiff, on which the taxes under controversy were paid and which is the basis of this suit, was blow-out patches and blow-out relinings for pneumatic tires. A blow-out patch is a medium of repair for pneumatic tires and is helpful in the case of holes in the tire, but is never used except in such cases. The purpose is to repair the bursted portion of a pneumatic tire and to thus prolong the life of the tire. They are made out of either new material or from sections of old tires. The application to the casing was made by cementing or vulcanizing plaintiff's product as sold to the inner surface of the casing. A blow-out of a casing may occur at any time during the period a pneumatic tire is used from the time it is new until worn out.

A blow-out may occur at any period during the life of a tire, but more especially when a tire has had quite a lot of service.

III. Plaintiff made and filed its manufacturer's excise-tax returns monthly for the period August, 1922, to February, 1926, inclusive, showing the amount of tax due thereon, which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff for the months, in the amounts, and on the dates hereinafter set forth, as follows:

Period	Year	Month	Year	Page	Line	Amount	Date paid
Aug	1922	Sept	1922	19	8	$7,659.97	9/8/22
Sept		Oct		23	1	5,988.04	10/ 9/22
Oct		Nov		34	3	3,729.90	11/18/22
Nov		Dec		28	2	2,767.57	12/ 7/22
Dec		Jan	1923	30	3	2,579.73	1/12/23
Jan	1923	Feb		24	8	3,676.03	2/12/23
Feb		Mar		31	8	3,351.31	3/17/23
Mar		Apr		22	2	5,475.51	4/10/23
Apr		May		26	5	5,582.97	5/11/23
May		June		23	7	4,910.58	6/ 7/23
June		July		23	2	4,161.66	7/12/23
July		Aug		45	5	4,718.32	8/29/23
Aug		Sept		25	4	3,177.86	9/14/23
Sept		Oct		30	0	5,483.55	10/11/23
Oct		Nov		25	9	4,398.40	11/ 9/23
Nov		Dec		30	3	4,238.97	12/13/23
Dec		Jan	1924	29	0	1,245.61	1/14/24
Jan	1924	Feb		33	4	2,750.48	2/20/24
Feb		Mar		26	3	1,959.44	3/18/24
Mar		Apr		28	8	3,898.21	4/11/24
Apr		May		35	4	3,034.73	5/19/24
May		June		32	6	3,114.52	6/19/24
June		July		38	0	4,145.38	7/19/24
July		Aug		21	9	2,536.69	8/18/24
Aug		Sept		13	9	1,956.00	9/11/24
Sept		Oct		14	4	1,752.03	10/11/24
Oct		Nov		14	6	1,307.10	11/19/24
Nov		Dec		18	2	881.22	12/19/24
Dec		Jan	1925	15	2	721.39	1/19/25
Jan	1925	Feb		9	5	928.80	2/12/25
Feb		Mar		12	5	789.23	3/14/25
Mar		Apr		7	8	1,205.47	4/ 6/25
Apr		May		16	0	1,212.76	5/12/25
May		June		13	9	1,989.42	6/17/25
June		July		12	1	2,242.81	7/16/25
July		Aug		10	2	1,598.05	8/10/25
Aug		Sept		11	4	901.29	9/11/25
Sept		Oct		10	7	997.93	10/ 8/25
Oct		Nov		12	1	1,078.90	11/13/25
Nov		Dec		17	4	990.66	12/10/25
Dec		Jan	1926	13	9	2,070.72	1/16/26
Jan	1926	Feb		15	5	1,110.85	2/24/26
Feb		Mar		15	5	526.26	3/23/26

IV. On September 14, 1926, plaintiff filed its claim for refund, #355578, of manufacturer's excise tax so paid on blow-out patches for the period August, 1922, to February,

1926, inclusive, in the amount of $11,625.96, which was duly rejected by the Commissioner of Internal Revenue on June 28, 1927.

The payment made on September 8, 1922, of $848.36, was barred by the statute of limitations at the time of the filing of the suit herein.

The court decided that plaintiff was entitled to recover $10,777.60 with interest from dates of payment thereof.

Moss, *Judge*, delivered the opinion of the court:

Plaintiff, Auburn Rubber Company, was engaged in the manufacture and sale, among other articles, of a certain device called a blow-out patch, designed and intended for use as a repair to broken or bursted pneumatic tires used on automobiles. Said patches are manufactured from salvaged tires or from new fabric, and are used in emergencies resulting from damage caused by a blow-out, or otherwise. Between the dates August, 1922, and February 27, 1926, plaintiff paid in monthly periods its excise taxes under the provisions of section 900 of the revenue act of 1921, and section 600 of the revenue act of 1924. A claim for the refund of said amount was duly filed and was rejected. This action is for the recovery of same.

Section 900 of the revenue act of 1921, 42 Stat. 227, provides:

"That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof) 3 per centum.

* * * * *

"(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2) sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum."

Section 600 of the revenue act of 1924 provides as follows:

"On and after the expiration of thirty days after the enactment of this act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased.

"(1) Automobile truck chassis and automobile wagon chassis sold or leased for an amount in excess of $1,000, and automobile truck bodies and automobile wagon bodies sold or leased for an amount in excess of $200 (including in both cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), 3 per centum. A sale or lease of an automobile truck or of an automobile wagon shall, for the purpose of this subdivision, be considered to be a sale of the chassis and of the body;

* * * * *

"(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 2½ per centum. This subdivision shall not apply to chassis or bodies for automobiles, trucks, automobile wagons, or other automobiles."

It is the contention of plaintiff that the blow-out patches manufactured and sold by it were not parts or accessories within the meaning of subdivision 3 of the act of 1921, and of subdivision 3 of the act of 1924, and with this contention the court is in agreement.

A blow-out patch is a medium of repair for worn out or bursted pneumatic tires, and the purpose of the use of same is to prolong the life of the tire. This case is similar in principle to the question involved in the case of *National Rubber Filler Company*, 63 C. Cls. 337, and is controlled by the decision in that case. The purpose of both the rubber filler and of the blow-out patch was precisely the same, i. e., to *prolong the life of the tire*. The opinion of the court in the *Rubber Filler case*, by Chief Justice Booth, contains a clarifying and convincing discussion of the question involved here, and we have reached the conclusion that under the ruling in that case the blow-out patch manufactured

and sold by plaintiff was neither a *part* nor an *accessory* within the meaning of the taxing statute.

Plaintiff is entitled to recover, and it is so adjudged and ordered.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

BICKETT COAL & COKE CO. v. THE UNITED STATES[1]

[No. D-1. Decided February 4, 1929]

On the Proofs

Contract for coal; "as called for"; coal not called for at termination "automatically canceled"; notice of refusal to take further deliveries.—Where the schedule of delivery in a coal contract is "as called for on or before" a designated date, and the contract further provides that "at expiration of this contract any undelivered material not covered by calls will be automatically canceled," there is no obligation on the part of the purchaser to take more than the amounts called for during the life of the contract, and a failure to take more is not a breach, nor is notice given by the purchaser before the expiration of the contract that it will take no more coal than that already ordered a cancellation of the contract.

The Reporter's statement of the case:

Mr. Horace S. Whitman for the plaintiff. *Mathews & Trimble* were on the brief.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Bickett Coal & Coke Company, is a corporation incorporated and organized under the laws of the State of Illinois for the general purpose of dealing in coal and coke. The plaintiff did not own or operate any coal mines but at all times herein mentioned, except as may here-

[1] Certiorari denied.

inafter appear, was engaged in the merchandising or selling of coal on a commission basis.

II. On July 1, 1920, plaintiff entered into a contract with the Quartermaster Corps, United States Army, represented by Hal T. Vigor, first lieutenant, contracting officer, for the delivery of 67,200 tons of bituminous coal as called for on or before June 30, 1921, by the Camp Quartermaster, Camp Custer, Mich., at a unit price of $4.50 per net ton, 2,000 pounds, f. o. b. mines located at Riley, Vigo County, Ind. It was stipulated therein that "at the expiration of this contract any undelivered material not covered by calls will be automatically canceled."

Pursuant to the terms of the contract plaintiff furnished bond in the penal sum of $30,200 for the faithful performance of the contract.

Copy of the material portions of the said contract is attached to the amended petition as Exhibit A and made part hereof by reference.

III. Between July 1, 1920, and October 19, 1920, the plaintiff was called upon under said contract to deliver 11,462.25 tons of coal.

After the aforesaid contract was entered into between the parties the wages paid the coal miners were increased twenty-five cents per ton and, by agreement between the parties, in accordance with paragraph 19A of this contract, the price of the coal under the contract was increased to $4.75 per ton and the increased wages remained in full force and effect until after the 30th day of June, 1921, and all coal delivered under the contract was paid for at the rate of $4.75 per ton of 2,000 pounds.

It was the practice of the plaintiff upon such call for delivery of coal thereupon verbally to request the McClelland Coal Company, whose selling agent it was, to prepare and ship the amounts so called for and upon the payment therefor by the War Department to remit the proceeds to the McClelland Coal Company, or otherwise adjust their accounts, withholding 25 cents per ton as a commission. The McClelland Coal Company was a corporation organized under the laws of the State of Indiana and engaged in producing coal from mines owned, equipped, and operated by the latter,

at Riley, Vigo County, Ind. The expenditures alleged in paragraph XIV of the original and paragraph X of the amended petition on account of plant, equipment, and facilities were all incurred, and paid by the McClelland Coal Company and installed in its coal mine, which paid the State taxes assessed thereon. The bills rendered by the sellers thereof to the McClelland Coal Company bear various dates between about September 24, 1920, and April 27, 1921, and were paid during the period beginning November 9, 1920, and ending April 29, 1921.

The plaintiff only orally agreed with the McClelland Company to take such quantity of coal from the latter as the former could sell.

The McClelland Coal Company temporarily shut down its mine April 1, 1921, finally ceased mining in January of 1922, and went into the hands of a receiver May 31, 1922. Its stock was assigned by the holders thereof in August, 1922, to the Columbus Mining Co. and the proceeds used in payment of the indebtedness of the McClelland Coal Company. Such plant, facilities, and equipment as the McClelland Coal Company had at the time were transferred by it to the Columbus Mining Company, who thereafter operated the mine. On December 31, 1923, the plaintiff sold its entire business to the Franklin County Coal Company.

IV. On or about August 13, 1920, at the direction of the Secretary of War, through the Chief of Staff, the Commanding General, Central Department, Chicago, Ill., was advised "that it had been decided to gradually abandon Camp Custer, Michigan." Concurrently therewith orders were issued to send the 10th and 14th Infantries then at Camp Custer to other stations and to dispose of all other personnel and without delay to commence the transfer of surplus equipment, property, and material therefrom as concerned the several bureaus of the respective departments of the Army, the chiefs of which were also directed to take the necessary action. On or about November 1, 1920, Camp Custer was abandoned.

V. On or about October 19, 1920, the plaintiff was notified by telephone by one Lieutenant Barr, an officer of the quartermaster's department at Chicago, that Camp Custer

was to be abandoned and that no further calls under its contract were to be made. At or about the time Camp Custer was ordered to be abandoned the Quartermaster General directed the cancellation of plaintiff's contract. In the latter part of October, 1920, Lieut. Col. James P. Barney, chief of the division of supply service, office of the Quartermaster General, in a conference therewith, told a representative of plaintiff that the Quartermaster General had ordered cancellation of the said contract. The contracting officer did not give the plaintiff written notice of termination of the contract.

After October 19, 1920, the plaintiff made no further shipments of coal to Camp Custer. At that time there had not been mined or stored any appreciable quantity of coal contemplated to be delivered at Camp Custer, nor did plaintiff order any more coal for such delivery.

VI. The coal delivered under the aforesaid contract was from mines owned and operated by the McClelland Coal Company. Expenditures on account of plant, equipment, and facilities made by the said McClelland Coal Company were for use in its general business, and were made without request therefor by the defendant. No contracting officer of the defendant made any contract for and in behalf of the United States with the McClelland Coal Company in respect to any coal covered by plaintiff's said contract with the Government, nor did any such officer approve of any contract between plaintiff and the said company with respect to such coal.

VII. The market price of the coal described in the contract in suit, at the time and place of the alleged breach, is not satisfactorily proved. The testimony tends to show that such price was not less than the contract price.

VIII. On or about February 3, 1921, the plaintiff filed a claim with the War Department, through the said Lieut. Col. Barney, for alleged loss sustained, wherein plaintiff claimed $1.25 per ton on 14,487¾ tons and $1.75 per ton on 41,250 tons, total $90,297.21, being the difference between the contract price of $4.75 and respective prices of $3.50 and $3.00 per ton on coal alleged to have been resold to the

Opinion of the Court

Pennsylvania Railroad Co. October 29, 1920, to December 31, 1920, and January 1, 1921, to March 31, 1921. The amount so claimed was varied from time to time, but plaintiff made no demand for premiums on bond or additional compensation attributable to depreciation or amortization of plant facilities or equipment.

The claim was finally rejected by the Secretary of War July 23, 1923, on the ground "that no notice of termination in accordance with Section 2, paragraph 9, of the contract was ever given by the United States, and that the clause in Schedule A, attached to and forming a part of the contract, reading as follows: 'At expiration of this contract any undelivered material not covered by calls will be automatically canceled,' is a complete defense to your claim."

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This claim grows out of a contract of date July 1, 1920, for 67,200 tons of bituminous coal run-of-mine, at $4.50 per ton, unit price. The contract provided that—

"The contractor shall furnish and deliver to the United States, and the United States shall accept and pay for, the articles of work described, and upon the terms and conditions set forth in 'Schedule A' attached hereto and by reference made a part hereof."

Schedule A provided, *inter alia*, that the coal was to be delivered f. o. b. mines, Riley, Vigo County, Indiana, and the schedule of delivery was as follows:

"As called for on or before June 30, 1921, by Camp Quartermaster, Camp Custer, Mich."

Schedule A also contained the following provision:

"At expiration of this contract any undelivered material not covered by calls will be automatically canceled."

The contract was approved September 8, 1920. The original contract, except Schedule A, with a few slight typewritten changes not important here, was a printed form of contract for supplies, and it clearly appears that as origi-

nally drawn was never intended to apply to a contract such as the one under consideration.

Schedule A is a typewritten addendum to the printed contract and embodies the essentials of the real contract between the parties.

Between July 1, 1920, and October 19, 1920, the plaintiff was called upon to deliver 11,462.25 tons of coal to Camp Custer. The coal was delivered and the plaintiff paid in full.

On October 19, 1920, by reason of the abandonment of Camp Custer as authorized and directed by the Chief of Staff of the War Department on August 13, 1920, the plaintiff was notified by the defendant that no more coal would be needed or required or called for delivery at that point. At the time of this notification the plaintiff did not have any coal on hand for shipment. Neither did the plaintiff call upon the McClelland Coal Company, from which it secured its supply, to furnish any coal for said camp after receiving said notification. After the abandonment of Camp Custer as aforesaid, the Quartermaster General directed the cancellation of the plaintiff's contract, and the plaintiff was informed to that effect. The plaintiff owned no coal and supplied it by means of an agreement with the McClelland Coal Company, a mine owner and producer of coal, to take such quantity of coal from the latter as the plaintiff could sell. Upon call by defendant for delivery, it was the plaintiff's practice to verbally request said McClelland Coal Company to prepare and ship the amounts so called for. On April 1, 1921, the McClelland Coal Company shut down its mine, and about August, 1921, sold its stock and plant, and discontinued business by reason of insolvency.

As stated, the notification to stop delivery of coal occurred on October 19, 1920, and the plaintiff filed its original petition in this court on January 3, 1924. In that petition it sought to recover an alleged amount expended for plant, facilities, and equipment by the McClelland Coal Company, as was properly apportioned " to the articles or work, the delivery or performance of which was terminated on October 19, 1920," amounting to $28,056.56, and also for depre-

ciation or amortization of plant and facilities and equipment at the McClelland Coal Company as an expense in the performance of the contract under consideration amounting to $11,107.07. Thereafter, on May 9, 1927, an amended petition was filed, based upon a breach of the contract by cancellation, and for a recovery of damages for loss between the market value of the undelivered coal and the contract price, and also for obligations incurred prior to October 19, 1920, in connection with the performance of the contract, for facilities, plant, and equipment and depreciation on said facilities, plant, and equipment. It will thus be seen that the original petition was filed for a recovery under the terms of the contract where there had been a termination of the contract by the defendant under paragraphs b and c of section 2 of the contract providing for termination of it in the public interest. The second petition is based upon a claim of breach of the contract by cancellation.

As to the first of these petitions it is not contended that the fifteen days' notice in writing from the contracting officer as therein required was given to make the termination effective. Nor is it averred, as alleged in the second petition that the contract was canceled or that it was breached.

Without at present considering the question whether the plaintiff could file an amended petition more than six years after the breach occurred, if breach there was, setting up a recovery upon the ground of breach, we will consider the meaning of the contract.

It may be that the plaintiff by reason of the action of the Government suffered a hardship in connection with this contract, but it is not the province of the court to make contracts. Its function is to construe and enforce them as it finds them, and as the parties have made them. As stated, Schedule A, which is the heart of this contract, being a typewritten addendum to it, provides in the schedule of delivery as to the coal contracted for, that it should be delivered as "called for on or before June 30, 1921," by the camp quartermaster at Camp Custer, Mich. Had this been the only provision, there might have been room for the

question as to whether a failure upon the part of the camp quartermaster at Camp Custer to call for a part of the coal on or before June 30, 1921, was a breach of the contract and whether this provision relieved the Government of the obligation to take all of the coal contracted for. Certain it is under this provision that the Government was not obligated for any coal not called for after June 30, 1921. If that be true, then this paragraph would seem to be meaningless, because it undoubtedly fixed the time within which the coal was to be called for and delivered, as the quartermaster at Camp Custer might determine. It may be questioned whether the Government was obliged to call all of it before June 30, 1921, as it was not obliged to call for any after that date, and if it was not obliged to call for any after that date it had an optional call which must necessarily apply to the time before that date.

However, we do not seem to be left in doubt as to this last conclusion. Schedule A further provides:

"At expiration of this contract any undelivered material not covered by calls will be automatically canceled."

If this provision is to be given a meaning and a reasonable construction, and it must be, it means that the Government was only called upon to take such an amount of the whole contracted for as it might order prior to the termination of the contract on June 30, 1921, and that any amount which had not been ordered prior to that date would be automatically canceled and the Government not be required to order or accept it. Or, to state it otherwise, the meaning of this clause is that at the expiration of the contract the Government was only to be held for such coal as it had ordered prior to the date of termination. While it is true that the Government on October 19th notified the plaintiff that it would order and accept no more coal, the plaintiff was in no worse condition by reason of this order than it would have been if the Government had remained silent until the 30th of June, 1921, the date of the termination of the contract, without ordering any more coal than it had ordered prior to October 19, 1920. In fact the notification to the plaintiff would seem to have been unnecessary upon the part of the

Government. It clearly was in the interest of the plaintiff and did not affect the interests of the Government, as the plaintiff would naturally desire to know as soon as possible how much of this coal the Government intended to order and accept.

When the contract terminated on June 30, 1921, there remained of the original 67,200 tons covered by the contract, undelivered, 55,737.75 tons, and this undelivered balance under this provision of the contract was automatically canceled as "undelivered material not covered by calls."

We do not see how any other conclusion can be reached without ignoring the plain meaning of the language of this last provision in Schedule A. Our conclusion is strengthened by reading this provision in connection with the other quoted provision regulating the schedule of deliveries and providing that they should be made "as ordered." The two taken together conclusively preclude the plaintiff's right to recover. In view of this conclusion it is unnecessary to pass upon the question of the statute of limitations in connection with the plaintiff's right to recover upon the ground set up in the second petition, or to pass upon the further question raised in the case, that the President, as Commander in Chief of the Army through the Chief of Staff, exercised a right of sovereignty in the Government in ordering the abandonment of Camp Custer, and that as this abandonment was the reason, and at the time given as the reason for not ordering any more coal under this contract, the plaintiff's loss was incidental to the exercise of a sovereign right, and any loss thereby occasioned can not be recovered. *Horowitz* v. *United States*, 267 U. S. 458; *Knox* v. *Lee*, 12 Wall. 457, 550, 551; *Jones & Brown* v. *United States*, 1 C. Cls. 383; *Wilson* v. *United States*, 11 C. Cls. 513.

Even if we did not hold, as we do, that the defendant did not breach the contract by not ordering and accepting the balance of the coal, and even if we did not hold that the provision above quoted automatically terminated the contract and further delivery of coal not ordered, the plaintiff still could not recover under the termination clause of the contract, *supra*, for the items of loss and obligations in-

curred specified in the original petition. These expenditures and losses, if made or incurred, were made and incurred not by the plaintiff but by the McClelland Coal Company with which the plaintiff as its selling agent had an agreement to handle its coal. There was no privity between the Government and the McClelland Coal Company, and nothing in the contract indicates in any way that the Government intended to be bound for any expenditures or obligations incurred by that company. Its contract was with the plaintiff, and these obligations and expenditures were not made by the plaintiff and could not have been in contemplation of the parties as liable to be made by the plaintiff, because, as was known to the defendant, the plaintiff was a mere selling agency and owned no coal and no mines of its own. That this was the situation clearly appears when it is seen that the plaintiff had no coal on hand at the time of the alleged termination of the contract on October 19, 1920, nor had it ordered any coal from the McClelland Coal Company for the fulfillment of this contract other than the coal which it had already delivered. No orders had been placed for the undelivered balance. It is also a question, if the McClelland Coal Company is to be taken, as is insisted, as the only source of supply, and that the plaintiff was the McClelland Coal Company, whether it was possible for it to have complied with its contract of delivery had the orders been given after the 15th of April, 1921, when the McClelland Coal Company shut down its plant.

Whatever may have been plaintiff's conception of this transaction, the contract which it entered into must control, as it is in writing and signed by the parties. In substance it is a transaction of an optional character. While the plaintiff agrees to deliver coal up to a certain amount as called for and at a certain price, the Government on the other side only agrees to pay for so much of the stated amount as it may call for, it being distinctly stated in the contract that any amount not called for at the expiration thereof shall be canceled. It may be said that this is a somewhat one-sided contract, but that is not for the court to consider. No other satisfactory construction can be given it.

Syllabus

The cases of *Burton Coal Co.* v. *United States*, 273 U. S. 337, 60 C. Cls. 294; *Sinclair Coal Co.* v. *United States*, 65 C. Cls. 704, and *H. G. Kellogg et al.* v. *United States*, 65 C. Cls. 717, are cited by the plaintiff. These cases are not in point. In the *Burton Coal Co. case* the whole of the amount of coal contracted for was purchased by the plaintiff, and there was no provision in the contract in regard to the coal being delivered as called for. That case went off on the ground that the Government had terminated the contract without complying with the requirements of section 2 of the contract as to notice.

In the *Sinclair* and *Kellogg cases* the Government had at the outset ordered all of the coal which was equivalent to purchasing all of the coal subject to future delivery as ordered. Here the Government ordered only part of the coal, paid for it according to the terms of the contract, and ordered no more, and this condition continued until the termination of the contract, when by its terms the Government was released from all obligation to take the balance of the coal.

The findings do not show what damage the plaintiff suffered by the alleged breach, or that it suffered any damage.

The original and amended petitions should be dismissed, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

RICHMOND SCREW ANCHOR CO. v. THE UNITED STATES[1]

[No. A–117. Decided February 4, 1929]

On the Proofs

Patents; infringement; damages; royalties.—Where a patentee throws his invention open to the public upon the condition that the user pay to him a fixed royalty, the extent of his injury in case of infringement, in the absence of clear and distinct evidence to the contrary, does not exceed the loss of the fixed royalty.

[1] Certiorari denied.

Reporter's Statement of the Case

Same; loss of right of injunction.—Semble, That in suit for infringement against the United States for use of an invention, the patentee is not entitled to damages for loss of the right of injunction against the manufacturer, of which it is deprived by the act of July 1, 1918, 40 Stat. 704, 705.

Same; interest.—In awarding royalties as damages for infringement of a patent by the United States, the patentee is entitled to interest thereon from the time the royalties should have been paid to the date of judgment.

The Reporter's statement of the case:

Mr. O. Ellery Edwards for the plaintiff. *Messrs. William Houston Kenyon, Archibald Cox, Joseph W. Cox, James H. Griffin*, and *Douglas H. Kenyon* were on the briefs.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. John S. Bradley* was on the briefs.

This case was originally decided June 4, 1923, 58 C. Cls. 433. On remand for ascertainment of damages additional findings were made December 7, 1925, 61 C. Cls. 397. A writ of certiorari having been granted, the Supreme Court reviewed the case and reversed the judgment January 3, 1928, 275 U. S. 331, remanding the case to the lower court for findings as to number of patented beams "made by contractors and furnished to the United States after the passage of the act of July 1, 1918, and what would have been a reasonable royalty therefor." The following additional findings were made pursuant to this mandate:

I. Construction work at the Brooklyn Army base was begun on May 15, 1918, and completed July 31, 1919.

The erection of structural steel work began after August 25, 1918, and subsequent to this date and prior to July 31, 1919, the contractors fabricated the individual elements called for by the claims of the patent in suit into 366 patented cargo beam structures as specified by the claims, and furnished the same to defendant.

There is no satisfactory evidence as to when the cargo or I beams, and other individual elements of the patented structure, were made by the contractors or how long prior

to their assembly into the patented structure they were shipped to the Brooklyn Army base, or furnished to defendant.

II. Construction work at the Army base, Norfolk, Va., was begun January 14, 1918. The erection of structural steel work began after July 30, 1918, and was completed May 22, 1919, and between these dates the contractors fabricated the individual elements called for by the claims of the patent in suit into 256 patented cargo beam structures, as specified by the claims, and furnished the same to defendant.

There is no satisfactory evidence as to when the cargo or I beams and other individual elements of the patented structure were made by the contractors. Cargo beams for Pier No. 1 were shipped to the erection site between July 17, 1918, and August 23, 1918.

Cargo beams for Pier No. 2 were shipped between August 9, 1918, and November 30, 1918.

III. A contract for construction work at the Navy base, Charleston, S. C., was entered into on April 30, 1918, and the work was completed June 15, 1919.

The detail shop drawings from which the cargo beams were made were sent to the shop on August 14, 1918.

These drawings which are plaintiff's Exhibits 106, 107, and 108 are by reference made a part of this finding.

Subsequent to August 14, 1918, and prior to June 15, 1919, cargo beams were made and fabricated by the contractors into 88 patented cargo beam structures, as specified by the claims of the patent in suit.

There is no satisfactory evidence as to when the cargo beams or other individual elements of the patented structure were shipped to the Charleston Navy base.

IV. One hundred of the 810 patented cargo beam structures involved in this case were constructed, installed by contractors, and furnished by them to the defendant at the Army base at New Orleans, La., between February, 1919, and June 15, 1919, and were in use there up to September 15, 1922, but were then totally destroyed by fire and have not been rebuilt.

Reporter's Statement of the Case

V. License fees of $5.00, $10.00, $15.00, and $20.00 per Lenke cargo beam structure have been paid.

The $5 fee was paid prior to the issuance of Lenke patent 1,228,120 and prior to the assignment of rights in the invention to plaintiff.

A royalty of $20.00 per beam structure was paid plaintiff by the State of New York on the installation at the Erie basin terminal in the fall of 1921, and was considered a regular charge in 1924.

VI. A reasonable royalty is the sum of $20.00 per patented cargo beam structure for the 810 patented structures made by the contractors and furnished to the United States after July 1, 1918, amounting to a total of $16,200 and $9,327.80, interest thereon.

VII. The use of the Lenke cargo beam by the United States instead of the cargo beams theretofore installed and used resulted in a saving of 2,000 pounds of metal per beam. The market price per pound of the kind of metal employed in the construction of cargo beam was 6½ cents per pound, thus enabling the United States to save in the expense of installation the difference in weight between the old beams used and the Lenke beam, viz, the difference between 3,300 pounds and 1,300 pounds, or 2,000 pounds on each beam installed, amounting in the aggregate to $105,300.

The United States installed the Lenke beams by contract with third parties. The beams were installed for the exclusive use of the United States. None were sold or installed for profit, other than such as accrued to the United States by reason of the saving in cost of installation. The single advantage which the United States gained by the use of the beams was the saving in cost of the same and the convenience resulting from their novelty. They were used by the United States for Government purposes. There is no competent proof in the record as to any other saving or advantage to the United States.

VIII. The plaintiff and earlier owners of the Lenke patent did not manufacture cargo beams of the Lenke type, but consistently followed the practice of licensing others to make and use them.

The court decided that plaintiff was entitled to recover $25,527.80.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The Supreme Court in reversing the above-entitled case remanded the same "for additional findings to show how many of the patented beams were made by contractors and furnished to the defendant after the passage of the act of July 1, 1918, and what would have been a reasonable royalty therefor." In addition to the foregoing order the court said:

"The question of the amount of or the rule for measuring the recovery we do not decide, but leave that for further argument and consideration by the Court of Claims, because of the novel and only partial application of Section 3477 Rev. Stat." (275 U. S. 331, 346.)

The original petition in the case prayed for a judgment of $132,000. Subsequent to reversal and remand the demand expanded to $498,564.18.

Following the mandate of the Supreme Court the case was remanded to our general docket and leave granted the parties to take proofs in accord with the Supreme Court's opinion. In response to this last order the plaintiff adduced a considerable volume of testimony by which it is now claimed a judgment for the sum last stated above is justified under the law. The claim now asserted is made up of the following items, which we discuss in order. The first is a claimed saving of $105,300.00 in installation cost. This item is predicated, from the standpoint of fact, upon the alleged difference between the quantity of steel required in the fabrication of the old as compared to the new beam. That there was a saving in this respect is true, i. e., the new beam was of lighter weight. This court found as a fact that the difference in weight was 2,000 pounds, which at 6½ cents per pound amounted to $105,300.00, and we repeat that finding now. (Finding IV, 61 C. Cls. 397.) Interest to the amount of $62,088.00 is claimed upon the above sums.

The second item is an unusual and novel contention. Predicating a right of recovery upon a strict analogy between this case and one of like character against a manu-

facturing infringer, the plaintiff asserts the loss of the right of injunction to restrain the manufacturer, a right of which it is deprived by the act of July 1, 1918, and which is capable of being reduced to a monetary value. The contention, we think, appears clearly from the following quotation from the plaintiff's brief:

"The witness Lenke shows that the total cost of replacing the 810 infringing cargo beams with an equal number of noninfringing cargo beams of equal capacity would, at the time of the installations of the infringing cargo beams, have been $166,050. His calculation adds the cost of the labor of removing the infringing beams and erecting the noninfringing beams in their places to the cost of the steel required for the latter and subtracts the scrap value of the steel of the former. The calculation is limited strictly to the net cost of substituting 810 noninfringing beams for the 810 infringing beams at the time of completion of the installation of the latter by the contractors.

"Under the act of 1910 the contractors would have been liable to suit for injunction by the owner of the patent against future infringement in addition to suit for damages and profits for past infringement, and, if issued, such injunction would have compelled an expenditure of $166,050 by the contractors in order to deliver an equal number of noninfringing beams to the defendant. This expenditure the contractors avoided, and this money they saved, by operation of the act of 1918, and the defendant, as indemnitor under that act for its contractors in their infringements, is liable to plaintiff for it as the injunction value—the money saved by the immunity from injunction—in addition to being liable to plaintiff for the gains and advantages realized by the contractors in the infringing manufacture. The contractors saved $103,480 by the infringing manufacture. They saved the further and additional sum of $166,050 by their immunity from injunction arising from the act of 1918."

Interest to the amount of $99,360.00 is likewise claimed upon this item.

The next two items are limited to the defendant's liability for use, the former being rested upon the contractor's liability in infringement cases. The plaintiff under these two items asserts that the beams require periodic painting to preserve the steel, and that, inasmuch as the Lenke beam is

of much smaller surface than the old beam, the upkeep of the former is materially reduced, and this applies with equal force to the essential appurtenances, both in upkeep and replacement. It is a trifle difficult to fathom the intricacies of the somewhat inexperienced expert accountant who evolved the figures upon which the plaintiff relies. Without even having seen the patented beam, and relying wholly upon the testimony of another witness, he reaches a conclusion as to the life of the patent beam and essential appurtenances, and applying the total cost of maintenance in a period of fifty years concludes, on the theory of apportionment, that the saving in upkeep would amount to $59,-809.78, to which amount interest is added in the sum of $7,506.40.

All of the foregoing items are claimed under the plaintiff's construction of the Supreme Court opinion. The argument for allowances is attempted to be justified upon a contention that the Supreme Court in its opinion, construing the act of July 1, 1918, expressly held that as to compensation the plaintiff was to be put in precisely the same situation he would have been had his right of action against the contractor not been denied him, and that, inasmuch as the items claimed could have been recovered in an action against the contractor, the Supreme Court clearly held the United States liable to the same extent. The question is not free from difficulty, and in our view of the case, without committing ourselves to the specific items claimed, we doubt without deciding the merits of the contention. Not wishing to foreclose the plaintiff from its right to insist upon its contentions, we have set forth the same and the items upon which it relies. However, the court is of the opinion that the case in the present instance does not turn upon this point. There exist certain axiomatic principles of patent law of ancient origin and continuously approved, which do not require citation, covering the methods by which a patentee may avail himself of his patent monopoly, and the rule for the ascertainment of damages for an invasion of his rights, after the patentee selects the method. First, a patentee may throw his invention open to the public upon the condition that the

user pay to him a fixed royalty, or he may retain exclusive use of the same, let it out to use only upon an exclusive license basis, and thus prohibit the remainder of the public from its use under any conditions. If the patentee chooses the former, fixes a royalty for use, then without doubt the extent of his injury is the loss of the fixed royalty. This is precisely what happened in this case. Beyond all doubt the plaintiff contemplated the enjoyment of this patent by anyone upon the payment of a fixed royalty. The record discloses that neither the plaintiff nor its assignors manufactured the patented cargo beams; so far as the record shows, not a single beam has ever been manufactured by the plaintiff or its assignors in accord with the Lenke invention. On the contrary, the president of the plaintiff company in his testimony in response to the following interrogatory:

"Is there any regular and established royalty for the use of cargo beams under the patent in suit,"

said:

"Yes; the regular charge is $20 per beam."

This is not all; this same company instituted a test case against the Bethlehem Steel Company, involving this patent, in which a claim for a fixed royalty of $20 per beam was asserted, and prior to this litigation $10 per beam was accepted as a royalty from the city of New York. It is true that this litigation resulted adversely to the plaintiff and the city of New York was enabled to escape the payment of any royalties; nevertheless the plaintiff by its own conduct offered the patented invention to the public upon the payment of a fixed royalty of $20 per beam. The plaintiff brought forth in the original case (58 C. Cls. 433) a record of its own production, a record of volume and directness, establishing a fixed royalty of $20 per beam. This was done by disclosing a voluminous correspondence with numerous manufacturing establishments throughout the country, to whom the patentee had granted licenses to use, the inventor disclosing the reasonableness of such a fixed royalty and in no single instance insistence by the plaintiff of a greater sum. The beam went into general use and the record does

not disclose a single license fee in excess of $20 and the record shows that the plaintiff at one time offered the Government a license to use the invention upon a $20 per beam royalty basis. In the present case we are asked to award judgment on the basis of $224 per beam royalty, an increase in excess of 10% of the amount ever recovered from any source for the use of the invention. Aside from this decided inflation, there is no competent evidence upon which to predicate such a judgment.

The plaintiff's patent was in no sense a pioneer one. In the original opinion of this court we said:

"The plaintiff's patent is obviously a combination patent, and in view of the prior art limited to the exact terms of the claims. It is, to say the most for it, quite narrow and, as the history of its course through the Patent Office clearly demonstrates, is limited to an improvement of an existing device in the manner and in connection with conjunctive elements set forth in the specifications and claims. To this extent, and within this narrow compass, we believe the plaintiff is an inventor. While cargo beams are old, and their use extended, nevertheless the plaintiff did contribute in a novel way a means adaptable to function successfully and accomplish the end with less expense and prolong without doubt the life and efficiency of the device created over the old one. The plaintiff's swinging beam, the vital factor of a cargo-beam mechanism, is admittedly an improvement over the old rigid beam and will without doubt retain its efficiency much longer and at a reduced expense to the owner." (58 C. Cls. 433, 439.)

In the early case of *Seymour* v. *McCormick*, 16 Howard 480, 490, 491, the Supreme Court held:

"Where an inventor finds it profitable to exercise his monopoly by selling licenses to make or use his improvement, he has himself fixed the average of his actual damage, when his invention has been used without his license. If he claims any thing above that amount, he is bound to substantiate his claim by clear and distinct evidence. When he has himself established the market value of his improvement, as separate and distinct from the other machinery with which it is connected, he can have no claim in justice or equity to make the profits of the whole machine the measure of his demand. It is only where, from the peculiar circumstances of the case,

no other rule can be found, that the defendant's profits become the criterion of the plaintiff's loss.

*   *   *   *   *

"It appears, from the evidence in this case, that McCormick sold licenses to use his original patent of 1834 for twenty dollars each. He sold licenses to the defendants to make and vend machines containing all his improvements to any extent for thirty dollars for each machine, or at an average of ten dollars for each of his three patents. The defendants made and sold many hundred machines, and paid that price and no more. They refused to pay for the last three hundred machines under a belief that the plaintiff was not the original inventor of this last improvement, whereby a seat for the raker was provided on the machine, so that he could ride, and not be compelled to walk as before. Beyond the refusal to pay the usual license price, the plaintiff showed no actual damage."

Again in *Rude* v. *Westcott*, 130 U. S. 152, a case cited in plaintiff's brief, the court said:

"In order that a royalty may be accepted as a measure of damages against an infringer, who is a stranger to the license establishing it, it must be paid or secured before the infringement complained of; it must be paid by such a number of persons as to indicate a general acquiescence in its reasonableness by those who have occasion to use the invention; and it must be uniform at the places where the licenses are issued."

This case, we think, meets every condition of the above citation. This court does not recite the evidence in the findings upon which the finding rests, except in the event of necessity for departing from the ultimate facts. We have found $20 to be a fixed and established royalty for the use of the invention, and the finding so made was not predicated upon licenses granted at remote periods of time or in sporadic instances. It is an ultimate fact gleaned from a record of contemporaneous dealings and positive actions of those most concerned in reaping the greatest profit from a patented monopoly.

Whether we are right or wrong, we are firmly convinced that in no event may a judgment for the so-called "injunctive value," of which the plaintiff alleges it was deprived by

the act of July 1, 1918, be awarded. This contention we regard as more or less fanciful. No such substitution as it is predicated upon was made, nor was it required.

Economy in upkeep and savings in replacements effected by the use of a patent are factors to be considered in ascertaining the validity of a patent. A device which facilitates output and materially reduces expense in construction does result in diminished cost to the user. We found this fact in reference to the Lenke beam and the Supreme Court commented favorably upon the same in ascertaining novelty. "There is no presumption of law or fact," says Robinson on Patents, "that the plaintiff has lost all that the defendant has gained, or that the defendant's advantage is equal to the plaintiff's loss." Proof upon the point is permissible as a factor in ascertaining damages in a direct proceeding between the patentee and an infringer, and in the absence of a fixed royalty usually it is available to disclose profits realized, and the single fact of saving in production is not alone sufficient to warrant a judgment for the amount proved. Other factors entering into the equation must also be established, and from all the facts pertinent to the issue the damages are to be ascertained. The proof here offered is not considered in making up our judgment, because of our holding of a fixed royalty for the use of the patent. In the absence of such a holding, we think the proof would be pertinent but not conclusive upon the issue of compensation for use, inasmuch as it does in some degree reflect the value of the use to the defendant. The primary difficulty attached to the proof offered in this case is its hypothetical character. The evidence, as previously observed, is predicated more or less upon conjecture and involves speculative features detracting from its probative effect.

We think under the authorities that the plaintiff is entitled to interest, under the law as stated in the opinion of the Supreme Court. The rule, as stated in Robinson on Patents (Vol. III, sec. 1066, p. 361), dates an allowance of interest upon a fixed royalty from the time the royalty should have been paid to the patentee to the date of judgment. The number of beams used by the defendant has never been in issue,

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and under the rule we add to the principal sum of $16,200.00 interest at the rate of 6 per cent per annum as follows:

Brooklyn Army Base, Finding I,	
366 beams @ $20 each	$7,320.00
Interest from July 31, 1919, to February 4, 1929	4,176.06
Total	11,496.06
Norfolk Army Base, Finding II,	
256 beams @ $20 each	5,120.00
Interest from May 22, 1919, to February 4, 1929	2,977.84
Total	8,097.84
Navy base, Charleston, S. C., Finding III,	
88 beams @ $20 each	1,760.00
Interest from June 15, 1919, to February 4, 1929	1,017.57
Total	2,777.57
Army base, New Orleans,	
100 beams @ $20 each	2,000.00
Interest from June 15, 1919, to February 4, 1929	1,156.33
Total	3,156.33

Judgment is awarded the plaintiff for $25,527.80. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

NATIONAL CANDY CO. v. THE UNITED STATES [1]

[No. F-90. Decided February 4, 1929]

On the Proofs

Income and profits taxes; affiliated companies; consolidated return; validity of Treasury regulations.—The regulations of the Commissioner of Internal Revenue requiring consolidated returns by affiliated companies were consistent with the revenue act of 1917, were appropriate for the purposes of the act, and such returns are now an established part of the Federal taxing system.

Same; "closely related business"; percentage of stock owned by parent company.—Where a corporation organizes a refining

[1] Certiorari denied.

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company for the purpose of securing corn syrup for its own use in the manufacture of candy, uses no other corn syrup, and owns 94½% of the stock of said refining company, the two are engaged in a "closely related business," and the percentage of stock owned is "substantially all," as that term is used in the regulations of the Commissioner of Internal Revenue administering the revenue act of 1917.

Same; presentation of claim to Commissioner of Internal Revenue.—In suit for recovery of taxes the item involved must have constituted a part of plaintiff's claim for refund before the Treasury Department.

The Reporter's statement of the case:

Messrs. R. S. Doyle and *A. Lowenhaupt* for the plaintiff. *Messrs. Stanley S. Waite* and *John Enrietto* were on the briefs.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway,* for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, the National Candy Co., is, and at all times mentioned herein was, a corporation organized under the laws of the State of New Jersey, with its principal office at St. Louis, Missouri. The Clinton Corn Syrup Refining Co. (formerly known as the Clinton Sugar Refining Co.) is, and at all times mentioned herein was, a corporation organized under the laws of the State of Iowa, with its principal office at Clinton, Iowa.

II. There has been assessed against the plaintiff under the revenue act of 1917 income and excess-profits taxes for the calendar year 1917 in the sum of $394,578.83, payment of which was made by plaintiff as follows: On June 15, 1918, $316,020.54; on July 24, 1920, $71,467.14; and on March 27, 1924, $7,091.15.

The first amount was the amount shown on the separate return of the plaintiff on April 1, 1918, and the other amounts were additional taxes assessed against it pursuant to an examination of its income and excess-profits tax returns and were paid pursuant to notice and demand dated July

14, 1920, and March 18, 1924, respectively. Payment of the amount of $7,091.15 was made under protest.

III. Within four years thereafter plaintiff filed a claim for refund in the amount of $71,467.14 on February 23, 1923, setting forth that its income and excess-profits taxes for the calendar year 1917 should be determined upon the basis of a separate and not a consolidated return. Plaintiff filed a second claim for refund in the amount of $85,636.28 on April 8, 1924, being made up of the payments of additional assessments of $71,467.14 and $7,091.15, setting forth that its income and excess-profits taxes for the calendar year 1917 should be determined upon the basis of a separate and not a consolidated return, and that the second assessment of $7,091.15 was unauthorized. No part of the amounts so claimed has ever been refunded or credited to plaintiff. Said first-mentioned claim for refund was rejected by the Commissioner of Internal Revenue on March 18, 1924. No action has been taken on said last-mentioned claim. This action was begun on March 2, 1926, less than two years after the rejection of said first-mentioned claim, and more than six months after the filing of the said last-mentioned claim.

IV. The total authorized and issued capital stock of the Clinton Sugar Refining Co. throughout the calendar year 1917 was $600,000 par value. Of that amount plaintiff owned $566,000 in par value, and the remainder was owned by various individuals, as follows: A. H. Kersting and L. P. Saenger, vice president and general superintendent, respectively, of the Clinton Sugar Refining Co., a total of $30,000 in par value together, and the balance, $4,000, was held by other directors of the Clinton Sugar Refining Co., who were substantial stockholders of the National Candy Co. Said stock owned by plaintiff in the year 1917 was part of the common stock acquired by it in 1906 in consideration of the issue by it of 5,700 shares of its second preferred stock, which had at that time a value of $100 per share as shown by the books.

V. The Clinton Sugar Refining Co. and the National Candy Co. did not so arrange their financial relationships as

to assign to either a disproportionate share of net income or invested capital during the year 1917.

VI. The National Candy Co. made no sales to the Clinton Sugar Refining Co. during the calendar year 1917.

During the year 1917 the total sales of all products of said Clinton Sugar Refining Co. amounted to $11,158,475.68, and the total sales of corn syrup made by said Clinton Sugar Refining Co. amounted to $8,525,593.71, representing a total of 187,395,963 pounds. The balance of the sales, amounting to $2,632,881.97, were sales of corn oil, gluten feed, and corn-oil meal.

During the year 1917 the National Candy Co. made net purchases of corn syrup from Clinton Sugar Refining Co. in the amount of $878,778.52, or a total of 18,884,918 pounds. This represents a proportion of 7.9% of the total sales of all products of the Clinton Sugar Refining Co., and a proportion of 10.3% of the total sales of corn syrup by said company. The National Candy Co. made no purchases other than those hereinabove set forth from the Clinton Sugar Refining Co.

All of said purchases were made at the list price f. o. b. Chicago for 43° corn syrup in barrels, which was the current market price for said product.

Plaintiff was not preferred over other customers of the Clinton Sugar Refining Co., either as to terms of sale or in the price of the products purchased. Plaintiff paid for its purchases the same price at which the Corn Products Refining Co. sold similar goods to its customers. In 1917 the latter company was the leading producer of corn syrup.

Plaintiff did not buy from or sell to the Clinton Sugar Refining Co. products or services at prices above or below the current market, or in any other manner effect an artificial distribution of profits.

VII. The Commissioner of Internal Revenue ruled that in 1917 substantially all of the stock of the Clinton Sugar Refining Co. was owned by the National Candy Co.; that the two companies were engaged in the same or a closely related business during the year 1917; and that said companies were affiliated for that year.

Throughout the year 1917 plaintiff was engaged in the manufacture of candy, operating factories in the cities of St. Louis, Mo.; Kansas City, Mo.; Chicago, Ill.; Grand Rapids and Detroit, Mich.; Indianapolis, Ind.; Louisville, Ky.; Duluth and St. Paul, Minn.; Buffalo, N. Y.; Minneapolis, Minn.; Cincinnati, Ohio; and Nashville, Tenn.

At the beginning of and throughout the year 1917 the Clinton Sugar Refining Co. was engaged in refining corn by the wet-milling process, manufacturing therefrom and selling corn syrup, corn oil, gluten feed, and corn-oil meal, its factory being located in the city of Clinton, in the State of Iowa.

None of the customers of the Clinton Sugar Refining Co., to whom it made substantial sales during the year 1917, were customers of the National Candy Co. Among some of the largest customers of the Clinton Sugar Refining Co. in 1917 were corn syrup mixers, textile industries, and tanners. Of the ingredients of the confectionery manufactured by the National Candy Co. during the year 1917, about 16% was represented by corn syrup. The principal ingredients used in said manufacture were sugar, chocolate, coconut, starch, gelatin, peanuts, and various other nuts.

VIII. At the beginning of and throughout the year 1917 the National Candy Co. had outstanding $1,000,000 in par value of first preferred stock, $1,665,400 of second preferred stock, and $5,294,600 in par value of common stock.

IX. The Commissioner of Internal Revenue calculated the tax for 1917 against the National Candy Co. and the Clinton Sugar Refining Co. on a consolidated basis. The statutory invested capital was computed to be $5,287,566.44. An analysis of this computation is shown by the following two tables:

TABLE I.—*Analysis of invested capital of Clinton Sugar Refining Co. as of December 31, 1916*

Capital stock	$600,000.00
Reserve for amortization of bond discount	17,100.00
Surplus	1,147,433.09
Total	1,764,533.09

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Decreases:		
National Candy Co. second preferred stock owned	$534,300.00	
Appreciation of assets per books	14,427.20	
1916 income tax adjustment	9,991.12	
Insufficient depreciation	3,550.29	
Bond-discount adjustment	280.33	
Bond discount allowed in 1906 and capitalized, disallowed	30,000.00	
Total decreases		$592,548.94
Balance		1,171,984.15
Increases: Good will purchased for cash		108,517.75
Total invested capital		1,280,501.90

TABLE II.—*Analysis of invested capital of National Candy Co. as of December 31, 1916*

First preferred stock		$1,000,000.00
Second preferred stock		1,699,300.00
Common stock		6,000,000.00
Surplus		1,644,021.74
Merchandise reserve		29,589.94
Total		10,372,911.68
Less:		
Second preferred stock owned by the company	$33,900.00	
Common stock owned by the company	705,400.00	
		739,300.00
Balance		9,633,611.68
Value of good will per books	5,294,600.00	
Value allowed by commissioner	1,491,940.00	
Excess	3,802,660.00	
Adjustment of inventory for interfactory profits	16,774.84	
Adjustment for income tax	10,686.27	
Adjustment for Clinton accumulated surplus taken up on books of National Candy Co	1,082,411.88	
Insufficient depreciation	150,000.00	
Clinton stock owned by National Candy Co	566,000.00	
Total decreases		5,628,532.99
Balance		4,005,078.69
Merchandise reserve		1,985.85
Total invested capital		4,007,064.54

The invested capital of the National Candy Co. alone before the consolidated basis, as calculated by the Commissioner of Internal Revenue, amounted to $4,007,064.54. This amount included $1,491,940 for the good will paid in for its stock. The allowance for good will was the maximum allowable under the statute, being twenty per centum of the par value of the stock outstanding (on a consolidated basis) on March 3, 1917. The stock outstanding on the consolidated basis amounted to $7,459,700.

The Mississippi Valley Trust Co. was associated with Edwin Carbin, of Chicago, Illinois, in organizing the National Candy Co., and purchased for $1,000,000 cash the first preferred stock of the National Candy Co. The books of the National Candy Co. show that prior to March 3, 1917, there was issued to Edwin Carbin, for services as promoter, common stock of the National Candy Co. of a par value of $324,500 and to the Mississippi Valley Trust Co. as a bonus common stock of the National Candy Co. of the par value of $1,465,500. These two issues of stock, having a par value of $1,790,000, were then worth $20 a share, or a total of $358,000.

The promotion services consisted of making arrangements with the confectioners to enter the consolidation in 1902 and extended over a period of two or three years. The promoter bore the expenses of traveling, of securing the agreements of parties to the consolidation, of printing, of appraising properties, and of auditing books. No part of said expenses was paid by the National Candy Co., other than by the issue of stock.

In 1906, the National Candy Co. acquired $566,000 in par value of the common stock of the Clinton Sugar Refining Co., paying therefor $566,000 in par value of its second preferred stock. In calculating invested capital, the Commissioner of Internal Revenue excluded this item on the ground that it represented common stock of a subsidiary held by a parent company.

The actual value of the second preferred stock of the National Candy Co. issued for the stock of the Clinton Sugar Refining Co. was $566,000.

X. The monthly average of notes payable of plaintiff during the year 1917 was $584,041.67; the monthly average of accounts payable was $112,947.40, or a total average monthly indebtedness of $696,989.07.

XI. The separate and individual net income of the National Candy Co. received by it during the year 1917 amounted to $1,533,618.54, of which sum $283,000 consisted of dividends upon the stock of the Clinton Sugar Refining Co. The said National Candy Co. also received the sum of $225 interest on obligations of the United States issued after September 4, 1917, which interest was not exempt from said excess-profits taxes, and paid the sum of $118.03 interest to carry said obligations of the United States.

XII. For the calendar year 1917 the Commissioner of Internal Revenue determined the net income of the National Candy Company to be $1,533,618.54, and of the Clinton Sugar Refining Company to be $1,808,519.34. No agreement was made at any time between the National Candy Company and the Clinton Sugar Refining Company with respect to the proportion in which the excess-profits taxes for the year 1917 due from said corporations should be allocated. The commissioner determined the excess-profits tax to be $1,177,867.91, and allocated $843,951.18 of this sum to the Clinton Sugar Refining Company and $333,916.73 to plaintiff company. By letter dated March 27, 1920, the commissioner advised plaintiff that in the absence of specific instructions for the allocation of the excess-profits tax the entire tax would be credited to the consolidated income, and the additional tax found due charged to plaintiff, and that any desired adjustment might be made between the two companies. Plaintiff made no objection to the above suggestion, and made no request for a different allocation.

XIII. The entire common stock of the National Candy Company was carried on the books of the company as good will. The following analysis of the company's good-will account, as shown by its books, was used by the Commis-

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sioner of Internal Revenue in computing invested capital on account of good will:

Original organization	$3, 400, 000
To promoter	324, 500
To purchasers of first preferred stock as bonus	1, 465, 500
To directors to qualify	300
G. W. Tormoehlen & Bro	31, 400
J. J. Dougherty	10, 000
I. S. Morse & Co	10, 000
John Wahl	35, 000
Lyons & Co	10, 000
Unexplained	8, 000
Treasury stock on hand	705, 300
Total	6, 000, 000

XIV. Plaintiff company organized the Clinton Sugar Refining Company in the year 1906 for the purpose of securing corn syrup for its own use in the manufacture of candy. Continuously thereafter and throughout the year 1917 all of the corn syrup used by plaintiff was the product of that company. At the time of its organization a concern called the "Corn Products Refining Company" had a monopoly of the corn-sugar business, and the purpose of said organization was to secure for plaintiff a dependable supply of corn syrup, which was a necessary ingredient in the manufacture of plaintiff's product.

XV. During the year 1917 the officers and directors of the National Candy Company were as follows: Osgood H. Peckham, president; Vincent L. Price, vice president; A. J. Walter, secretary; F. D. Seward, treasurer; Frank A. Munne, Alfred W. Paris, Ronald M. Bates, and Richard R. Bean, directors. All of the officers were directors.

XVI. During the year 1917 the officers and directors of the Clinton Sugar Refining Company were as follows: Osgood H. Peckham, president; Vincent L. Price, vice president; A. H. Kersting, vice president; A. J. Walter, secretary; F. D. Seward, treasurer; Frank A. Munne, Alfred W. Paris, Frank E. Peckham, directors. All of the officers were directors.

The court decided that plaintiff was not entitled to recover.

Opinion of the Court

Moss, *Judge*, delivered the opinion of the court:

Plaintiff, National Candy Company, was organized in 1902 and was engaged in the manufacture and sale of candy. In 1906 plaintiff organized the Clinton Sugar Refining Company (now called the Clinton Corn Syrup Refining Company) and acquired $566,000 of the $600,000 in par value of the common stock of same. Plaintiff and the Clinton Sugar Refining Company filed separate tax returns for the calendar year 1917. The Commissioner of Internal Revenue determined that during that year the two companies were affiliated within the meaning of the war revenue act of 1917 and the regulations promulgated thereunder, and computed and assessed the excess-profits tax for 1917 against the two corporations on a consolidated basis, which resulted in the payment by plaintiff of an additional tax. Claim for refund was duly filed and was rejected. This action is for the recovery of the additional tax.

Section 201, Title II, of the revenue act of 1917, 40 Stat. 303, which is the act creating the excess-profits tax, contains the following provision:

"For the purpose of this title every corporation or partnership not exempt under the provisions of this section shall be determined to be engaged in business, and *all the trades and businesses in which it is engaged shall be treated as a single trade or business, and all its income from whatever source derived shall be determined to be received from such trade or business.*" (Our italics.)

Under authority expressly provided in this act the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated certain regulations for the administration of the act. Article 77 of said regulations provides that every corporation shall describe in its returns all its intercorporate relationships with other corporations, and will furnish such information in relation thereto as will enable the Commissioner of Internal Revenue to properly compute the tax on the basis of an equitable accounting. It also provides that, "For the purpose of this regulation two or more corporations will be deemed to be affiliated (1) when one such corporation owns, directs, or

controls, through closely affiliated interests, or by a nominee or nominees, all, or *substantially all* of the stock of the other, or others, or when substantially all of the stock of two or more corporations is owned by the same individual or partnership, and both or all of such corporations are engaged in the *same* or a *closely related business;* * * *." (Our italics.) Article 78 authorizes the commissioner to require the filing of consolidated returns of net income and invested capital whenever necessary to more equitably determine the invested capital or taxable income, and it further provided that if such corporations, when requested to file such consolidated returns, shall neglect or refuse to do so, the commissioner may cause an examination of the books of such corporations to be made and a consolidated statement to be made therefrom. In cases where the consolidated returns are accepted, the total tax will be computed as a unit upon the basis of the consolidated return, and will be allocated to the respective affiliated companies in such portions as may be agreed among them. But if no such agreement is made, the tax will be assessed by the commissioner upon each such corporation in accordance with the net income and invested capital properly assignable to it.

It was under the authority of these regulations that the commissioner determined that the two companies involved herein were affiliated. We are unable to agree with plaintiff's contention that articles 77 and 78 were unauthorized, because contrary to the provisions of the statute. It is a well-established rule that a departmental regulation will be upheld unless, in the judgment of the court, it is "plainly and palpably inconsistent with law." *Boske* v. *Comingore*, 177 U. S. 459. It can not reasonably be contended that the regulations in question requiring consolidated returns by affiliated corporations were inconsistent with the provisions of the act of 1917. On the contrary, such regulations appear to be entirely appropriate for the ends and purposes of said act. Furthermore, it should be noted that the interpretation of the act by the Commissioner of Internal Revenue, as expressed in the foregoing regulations, was approved by Congress in the subsequent enactment of the revenue act of 1918, which embodied in its terms the essential requirements and

provisions of said regulations. 40 Stat. 1081, 1082. It will further be observed that by the revenue act of 1921, section 1331 (c), 42 Stat. 319, Congress again incorporated the requirements and provisions of said regulations, and provided that "The provisions of this section are declaratory of the provisions of Title II of the revenue act of 1917." The theory of consolidated returns by affiliated corporations is now a well-established principle of our taxing system. It is not an attempt, as plaintiff urges, to assess a tax against one taxpayer measured by the income of another taxpayer. The principle upon which it is based is succinctly stated in article 631 of Treasury Regulation 69, as follows:

"Consolidated returns are based upon the principle of levying the tax according to the true net income of a single enterprise, even though the business is operated through more than one corporation. Where one corporation owns the capital stock of another corporation or other corporations, or where the stock of two or more corporations is owned by the same interests, a situation results which is closely analogous to that of a business maintaining one or more branch establishments. In the latter case, because of the direct ownership of the property, the net income of the branch forms a part of the net income of the entire organization."

The constitutionality of the requirement for consolidated returns by affiliated corporations, as provided by the revenue act of 1918, was upheld in the case of *United States* v. *Whyel*, 19 Fed. (2d) 260, wherein the court said: "There is no question as to the right of two or more corporations to become affiliated, and, where such relationships are voluntarily assumed by the companies, there would appear no valid objection to the application of the statute, as the total tax is computed as a unit. The authority to distribute the tax equitably is vested in the corporations themselves, and it is by no means apparent that any hardship or injustice can result from such an arrangement."

We conclude, therefore, that the act of 1917, as interpreted by the commissioner and as construed by section 1331 of the act of 1921, is not in violation of the Constitution of the United States in any respect.

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Plaintiff owned 94.33 per cent of the stock of the Clinton Sugar Refining Company. That this percentage brings the case within the meaning of the term "substantially all," in the light of the authorities, scarcely needs argument. In *Mahoning Coal Railroad Company*, 4 B. T. A. 923, a holding of 81 per cent of stock was held sufficient, and in *Watsontown Brick Company*, 3 B. T. A. 85, a holding of 93.6 per cent was determined to be sufficient. There are numerous other decisions to the same effect.

With regard to the question as to whether or not plaintiff and the Clinton Sugar Refining Company were, in 1917, engaged in the same or a "closely related business," it must be remembered, in the first place, that plaintiff itself organized the Clinton Sugar Refining Company in 1906 to meet a situation which at that time was threatening serious embarrassment to plaintiff in the matter of supply of corn syrup. The "Corn Products Refining Company" at that time had a monopoly on the production of corn syrup, which is one of the principal ingredients in the manufacture of candy, constituting 16 per cent in value of the total of raw materials used in such manufacture. There were also rumors that said Corn Products Refining Company was endeavoring to secure control of the important users of corn syrup. In these circumstances plaintiff was unable to obtain prompt and satisfactory supplies of corn syrup, and determined upon the policy of manufacturing its own supply of that material; and it was to effectuate that purpose that plaintiff organized the Clinton Sugar Refining Company. It will also be noted that the officers and directors of the two companies were the same, and they held the same relative positions in each company, except that the Clinton Sugar Refining Company had two vice presidents, only one of whom was vice president in plaintiff's company, and plaintiff had four directors, only three of whom were directors in the Clinton Sugar Refining Company. Plaintiff company, as stated above, owned 94.33 per cent of the stock. It is impossible to conceive of a more striking example of a "closely related business" than that which is afforded by the facts in the instant case. And the fact that the Clinton Sugar

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Refining Company, organized by plaintiff for the purpose of supplying an essential ingredient for the production of candy, and managed and controlled by the same officers, developed a capacity for the production of a much larger supply of the raw material than was needed by plaintiff, and was able to engage in a profitable business with the outside trade, does not affect the principle. In legal effect, the relationship between the corporations remains precisely the same as if the original purpose of supplying plaintiff's own needs for corn syrup had been adhered to. Inasmuch as the purpose of the organization and operation of the Clinton Sugar Refining Company was, in a large part, to produce and supply an essential portion of plaintiff's raw material, it is not merely a "closely related business," but might logically be construed as a part of the *same* business.

Plaintiff makes the further contention that there should have been added to its invested capital, as an alleged organization expense, the sum of $358,000. This contention is not supported by the record. The entire common stock of plaintiff company was carried on the books of the company as good will. Two of the items contained in the good will account were as follows:

To promoter	$324,500
To purchasers of first preferred stock, as bonus	1,465,500

The first item of $324,500 represents a block of common stock, of the actual value of $64,900, which was issued to one Edwin Carbin for services in promoting the organization of the National Candy Company. The second item of $1,465,500 represents a block of the common stock of the actual value of $293,100, which was issued to the Mississippi Valley Trust Company *as a bonus*. This company paid to plaintiff the sum of $1,000,000 in cash, and received therefor all of the first preferred stock issued by plaintiff company, together with the block of common stock mentioned above. These two issues of common stock were of the value of $20 a share, or a total of $358,000. Plaintiff contends that these two items represent organization expenses and should be added to invested capital. It will first be noted that the items are different in character. The stock issued to Edwin

Carbin was for services in the promotion and organization of plaintiff company, while as to the other item, the Mississippi Valley Trust Company, which had underwritten the first preferred stock of plaintiff company, amounting to $1,000,000, paid that amount in cash for all of said preferred stock, which was issued and delivered to said company, together with a *bonus* of the common stock of the actual value of $293,100. It is not made to appear that any part of said stock was issued in consideration of promotion services. Assuming, however, that both items represent a total organization expense of $358,000 as contended, the elimination of that sum from the good will account, and the addition of same to organization expense, would not affect the amount of invested capital. However, plaintiff can not recover on this item for the reason that same constituted no part of the claims for refund presented by plaintiff. In the case of *Tucker* v. *Alexander*, 15 Fed. (2d) 356; 275 U. S. 228, the Circuit Court said:

"The evident purposes and objects of this condition (filing of claim) are to afford the commissioner an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto. Unless the claimant were required to present to the commissioner *all* of the grounds upon which he relies for refund, the above purposes and objects would be partially or entirely defeated." (Our italics.)

While this case was reversed by the Supreme Court on the ground that the failure to state the ground in the claim for refund had been waived, the principle announced by the Circuit Court, as above quoted, remains unaffected. In the case of *Red Wing Malting Company* v. *Willcuts*, 15 Fed. (2d) 626, in which certiorari was denied, the same court said:

"The *precise* ground upon which the refund is demanded *must be stated in the application to the commissioner*, and we think if that is not done a party can not base a recovery in the court upon an entirely different and distinct ground from that presented to the commissioner." (Our italics.)

It is further contended by plaintiff that the commissioner failed to properly allocate the excess-profits tax between plaintiff and the Clinton Sugar Refining Company. This

particular question was brought to the attention of plaintiff in a letter from the defendant dated March 27, 1920, in which it is stated:

"In the absence of specific instructions as to how you desire to allocate the excess-profits tax, the entire excess-profits tax is credited to the consolidated income, and the additional tax found due, charged to you. In this case any adjustment desired may be made between the companies on your books."

No objection whatever was made to this suggestion, nor was there any request for a different allocation, and no complaint was presented to the commissioner in any claim for refund. Plaintiff is therefore precluded from asserting same at this time. See *Tucker* v. *Alexander*, and *Red Wing Malting Company* v. *Willcuts*, above cited.

We have reached the conclusion that the action of the commissioner in determining that the two companies involved herein were affiliated in the year 1917, and in computing and assessing the tax accordingly, was correct. The petition will therefore be dismissed.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

CRACKER JACK CO v. THE UNITED STATES [1]

[No. F-97. Decided February 4, 1929]

On the Proofs

Excise tax; candy; pop-corn products.—The pop-corn products manufactured by plaintiff *held* to be properly taxed as candy.

Same; Treasury regulations.—The regulation of the Commissioner of Internal Revenue defining candy as inclusive of pop corn "mixed with or covered with molasses, sugar, or other sweetening agent," is in reasonable conformity with the acts of Congress imposing a tax on the sale of candy, is reasonably adapted to their enforcement, and has the force of law.

Same; burden of proof.—Where a product is within the terms of a regulation of the Commissioner of Internal Revenue interpreting an excise-tax law, the burden is upon the taxpayer, in suit for recovery of tax assessed, to show that the regulation is not in conformity with the statute.

[1] Certiorari denied.

Reporter's Statement of the Case

Same; tax on luxuries.—The purpose of section 900 of the revenue acts of 1918 and 1921 was to tax luxuries.

Statutory construction; doubt as to meaning of a word.—Doubt as to the meaning of a word can be removed by considering the general purpose and intent of a statute.

The Reporter's statement of the case:

Mr. Jacob Mertens, jr., for the plaintiff. *Messrs. George E. Holmes* and *Valentine B. Havens*, and *Holmes, Paul & Havens* were on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. On and after January 1, 1919, and prior to July 28, 1922, Rueckheim Brothers & Eckstein was a corporation existing under the laws of the State of West Virginia.

On December 24, 1921, plaintiff was organized as a corporation under the laws of the State of Illinois, and since said date has existed as such corporation.

In the year 1921, Rueckheim Brothers & Eckstein decided to reorganize its business so that the same might thereafter be carried on under the name of the Cracker Jack Co. To effectuate such purpose the plaintiff herein was organized on December 24, 1921; the directors and stockholders of the said two corporations remained the same, the Cracker Jack Co. succeeding to the rights and interests of the said predecessor corporation, including the matters hereinafter stated.

On or about July 29, 1922, Rueckheim Brothers & Eckstein was duly dissolved in accordance with the laws of the State of West Virginia in such case made and provided.

II. The plaintiff (the term being hereinafter used to cover both Rueckheim Brothers & Eckstein and the Cracker Jack Co.) was engaged in the manufacture and sale of pop-corn products in the city of Chicago, Ill., at all the times referred to herein.

III. The said pop-corn products manufactured and sold by plaintiff were Cracker Jack (also a similar product called Chums), pop-corn balls, and pop-corn bricks.

IV. The said pop-corn products manufactured and sold by the plaintiff consisted of pop corn with a thin coating of syrup which is composed of corn syrup, raw sugar, with the addition of molasses in the case of Cracker Jack (and Chums).

V. The process through which Cracker Jack passes is as follows: The pop corn, after being gathered from the field, is cured and shelled. At the manufacturing plant the shelled corn is popped and screened to remove unpopped or partly popped kernels. It is then measured and placed in mixing tubs. A syrup consisting of dissolved sugar, corn syrup, and molasses is then placed in a kettle and cooked eight or nine minutes, being agitated constantly. A small quantity of peanuts is added to the syrup before cooking. After the syrup is cooked it is poured into the mixing tub containing the proper amount of popped corn, and the mixture is then placed in reels, where it is allowed to cool. The process of mixing and cooling is such that, after cooling, each kernel of popped corn is separated from the mass. The product is then automatically boxed in air and moisture tight wax-paper cartons.

Pop-corn balls and bricks are prepared similarly except that there is no molasses in the syrup and the finished product is formed into a solid mass and wrapped in wax paper.

By weight the finished Cracker Jack was 32.9% popped corn, 8.3% peanuts, and 58.8% sugar, corn syrup, and molasses.

VI. The plaintiff paid Federal excise taxes on these pop-corn products to the Commissioner of Internal Revenue for the period from February 25, 1919, to July 2, 1924, in accordance with the requirements of the regulations issued by the Commissioner of Internal Revenue.

VII. During the period from 1918 to 1924, inclusive, the leading manufacturers of pop corn and pop-corn confectionery in the United States were Rueckheim Bros. & Eckstein (the Cracker Jack Co.), Shotwell Manufacturing Co., and D. L. Clark & Co. These three companies manufactured and sold during this period over 90 per cent of the pop corn and pop-corn confectionery manufactured.

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VIII. Following the enactment of the revenue act of 1918, February 24, 1919, the Commissioner of Internal Revenue commenced the formulation of regulations interpreting the excise-tax provisions of that act. After several informal conferences a formal hearing was held with representatives of the National Confectioners Association, which included approximately four-fifths of the candy manufacturers in the United States, at which the commissioner was represented by Mr. John E. Walker, Deputy Commissioner of Internal Revenue, who as clerk of the House Ways and Means Committee was in a general way familiar with the proceedings before that committee on the same subject matter; by the Solicitor of Internal Revenue; and by a lawyer in the office of the Solicitor of Internal Revenue. At this hearing the National Confectioners Association suggested a definition of candy, and the regulations for the enforcement of the statute, hereinafter recited, were in substantial conformity with the definition suggested.

IX. Regulations 47 interpreting the excise tax provisions of the revenue act of 1918 were approved May 1, 1919, and were effective as of February 25, 1919.

X. Article 22 of Regulations 47 (approved May 1, 1919), reads in part as follows:

"Candy within the meaning of the act includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glacé or candied fruits and nuts, popcorn and other cereals or cereal products mixed with or covered with molasses, sugar, or other sweetening agent, hard candies, plain and chocolate covered marshmallows, candy cough drops and sweetened licorice not taxed as cough drops, sweet chocolate and sweet milk chocolate whether plain or mixed with fruits or nuts; and all similar articles however designated. It does not include, however, cereal breakfast foods, cake and pastries, nor bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste. If a manufacturer of glacé or candied fruits at the time the goods are shipped or sold (whichever is prior) has in his possession an order or contract of sale with certificate of the purchaser printed thereon or in writing and permanently attached thereto,

showing that such fruits so purchased are to be used in the manufacture of food products, such as ice cream, cakes, and pastries, the sale thereof shall not be taxable. Where a manufacturer of candy sells in connection with the sale of his own product candy which he has bought from another manufacturer and on which he has performed no further process of manufacture the tax attaches only to such portion of the goods sold as have been manufactured by him."

XI. Article 22 of Regulations 47 revised (approved December 27, 1920), reads in part as follows:

"Candy within the meaning of this subdivision—

"(a) Includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glacé or candied fruits and nuts not specified in paragraph (b) of this subdivision; pop corn and other cereals or cereal products, not specified in paragraph (b) of this subdivision, mixed with or covered with molasses, sugar, or other sweetening agent; hard candies; plain and chocolate-covered mashmallows; candy cough drops sold in bulk and without remedial claims (see Art. 16, Regulations 51); sweetened licorice not taxed as cough drops under section 907; sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts, not specified in paragraph (b) of this subdivision; maple sugar mixed with fruit, nuts, etc., not specified in paragraph (b) of this subdivision; and all similar articles however designated; but

"(b) Does not include cereal breakfast foods, cake and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste, powdered chocolate, maple sugar or sirup not mixed with nuts, etc., marshmallow paste, glacé or candied fruit peel and citron, or sweet chocolate, glacé or candied fruits and nuts sold by the manufacturer under circumstances where it is obvious from the condition of the product, methods of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold.

"Where a manufacturer sells candy which is packed or put up for sale in a fancy or plain box or container the tax is computed upon the selling price of the candy and container, whether the container is billed separately or not. However, where candy is purchased and the purchaser selects a fancy box or container in which the candy is placed the tax attaches to the selling price of the candy and not to

the cost of the box. In such cases, if the sale is billed, the container and candy must be billed as separate items."

XII. Article 19 of Regulations 27, revised (approved January 6, 1922), is substantially identical in its pertinent provisions with the provisions of article 22 of Regulations 47, revised (approved December 27, 1920).

XIII. The pop-corn products of this company come within the terms pop corn and pop-corn confectionery.

XIV. Beginning with the month of February, 1919, and monthly thereafter, Rueckheim Brothers & Eckstein filed with the collector of internal revenue for the first district of Illinois, on the forms provided by the Commissioner of Internal Revenue for that purpose, returns for each of the months from February, 1919, to November, 1921, showing the amount of sales for each of said months, respectively, and computed a tax thereon at the rates then in force for excise tax on the sale of candy.

The tax so computed under each of said returns was thereafter paid by said Rueckheim Brothers & Eckstein to the said collector of internal revenue and by said collector turned over to the United States, which still retains the same.

XV. Beginning with the month of December, 1921, and monthly thereafter the Cracker Jack Co. filed with the collector of internal revenue for the first district of Illinois, on the forms provided by the Commissioner of Internal Revenue for that purpose, returns for each of the months from December, 1921, to June, 1924, both inclusive, showing the amount of sales for each of said months, respectively, and computed a tax thereon at the rates then in force for excise tax on the sale of candy.

The tax so computed under each of said returns was thereafter paid by the Cracker Jack Co. to the collector of internal revenue for the first district of Illinois, and by said collector turned over to the United States, which still retains the same.

XVI. The amount of the taxes so paid, together with the respective dates of payment, and the particular month for the sales of which the taxes were paid, are set forth in a statement marked "Exhibit A" and annexed to the petition, all of which is incorporated herein by reference.

XVII. On or about November 28, 1923, the plaintiff filed a written claim with the collector of internal revenue, first district, Illinois, which claim alleged that the excise taxes on its pop-corn products paid previously thereto were improperly and erroneously collected, said claim being thereafter amended and supplemented by the claims referred to in the next two succeeding findings.

XVIII. On December 31, 1923, the company filed with the collector of internal revenue, first district, Illinois, a claim for refund in the amount of $115,000, covering payments made from June 14, 1919, to July 29, 1920, for the taxes due for the period from February 25, 1919, to June 30, 1920.

XIX. On August 22, 1924, the company filed with the collector of internal revenue, first district, Illinois, a statement supplementing the said claims filed November 28, 1923, and December 31, 1923, and reducing the amount sought to be recovered from $115,000 to $61,747.88.

XX. On or about August 22, 1924, the company filed with the collector of internal revenue, first district, Illinois, a claim for refund in the amount of $285,100.30, covering payments made from August 30, 1920, to July 31, 1924, for taxes due for the period from July, 1920, to June, 1924, inclusive.

XXI. All of said refund claims were based upon the alleged erroneous classification and taxation by the Commissioner of Internal Revenue of the pop-corn products of the Cracker Jack Co. and Rueckheim Brothers & Eckstein as candy.

XXII. The said refund claims were rejected by the Commissioner of Internal Revenue on or about November 28, 1925, such rejections appearing on Schedule No. 1174, which schedule was forwarded to the collector of internal revenue, first district, Illinois.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

The revenue act of 1918, 40 Stat. 1122, sec. 900 (9), taxed "candy" at 5 per cent of the price at which sold, and the act of 1921, 42 Stat. 291, sec. 900 (6), taxed "candy" at 3

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per cent of the price at which sold. These are the applicable statutes in this case.

There is no dispute about the amount of the tax paid.

The statutes authorized the commissioner to make proper regulations for carrying them into effect. This was necessary because it was impracticable for Congress to provide general regulations for the various details of statutes of this kind, and while it may be difficult at times to define the line which separates the legislative power to make laws and administrative authority to make regulations, that question is not involved here.

The plaintiff's product is admitted to be within the regulations (see Findings X and XI) of the commissioner defining "candy," and there is therefore no question about the meaning of the regulations. The only question is whether the regulations are in violation of the express provisions of the statutes, and, if not, whether they are reasonably adapted to the enforcement of the acts and in conformity with their purpose and spirit. See *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349. If they are in reasonable conformity with the acts and not in violation of their express provisions, they will have the force of law. The plaintiff's product being within the terms of the regulations and taxable, the burden of showing that the regulations are not in conformity with the statutes is upon the plaintiff; in other words, the burden is not upon the defendant to show that the plaintiff's product is candy as it is defined in the regulations, but upon the plaintiff to show that it is not, or, more broadly stated, that the burden is on the plaintiff "to prove the facts establishing the invalidity of the tax." *United States* v. *Anderson*, 269 U. S. 422, 443. Doubt as to the meaning of a word can be removed by considering the general purpose and intent of a statute. See *American Security & Trust Co.* v. *District of Columbia*, 224 U. S. 491.

It is also true that the findings of administrative officers and their practice are presumed to be based upon conclusions which are the result of investigation. Congress having used the word "candy" without definition, it becomes necessary as an administrative act for the Commissioner of Internal Revenue to define it by regulations for the informa-

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tion of taxpayers. The representatives of the manufacturers of candies, confections, sweetmeats, etc., were before Congress prior to the passage of these acts and were heard. The clerk of the House Ways and Means Committee, where these hearings took place, was a Mr. Walker, who at the time of the making of the regulations (see Findings X and XI) defining "candy" was Deputy Commissioner of Internal Revenue, and by reason of his service as clerk was generally acquainted with what took place before the committee. The Deputy Commissioner of Internal Revenue and the manufacturers had a conference, and the representative of the National Confectioners Association, which embraced about four-fifths of the manufacturers of candies, candied fruits, nuts, pop corn, and similar articles had conferences with Mr. Walker before, and was present at, the hearing where the Commissioner of Internal Revenue was represented by Mr. Walker, deputy commissioner, the Solicitor of Internal Revenue, and one of the attorneys in his office. After the hearing the regulations (Findings X and XI) embodying the definition of "candy" were promulgated by the commissioner. This definition is in substantial conformity with a definition suggested at the hearing by the National Confectioners Association. So that it clearly appears that this definition was not reached until after careful hearing and consideration, which must necessarily increase the presumption as to its reasonableness. That it is not in conflict with the express language of the acts is clear. But, more than this, a reading of both acts, and particularly section 900 of each, above mentioned, shows that the purpose of these sections was to tax luxuries, that is, to tax articles the use or consumption of which would ordinarily be considered indulgence in a luxury rather than a necessary article of food.

A description of the product and the process of its manufacture we think shows that its consumption is indulgence in a luxury. The plaintiff's product, known as Cracker Jack, consisted of pop corn mixed with a syrup, which after cooking crystallized. The syrup consisted of dissolved sugar, corn syrup, and molasses. It was cooked for a short time, and to it, while cooling, was added a small quantity

of peanuts. After further cooking, this mixture of syrup and peanuts was poured into a tub containing pop corn and stirred and the mixture placed in reels where it was allowed to cool. The process of mixing and cooling was of such character that after cooling, each kernel of pop corn was separated from the mass, but as separated had a coating of crystallized syrup. It was then automatically boxed in an air and moisture tight wax paper carton and in this form sold. The proportions of the mixture were as follows: Popped corn 32.9%; peanuts, 8.3%; sugar, corn syrup, and molasses, 58.8%. It will be seen that this product is of the same kind and class as peanut brittle, candied fruit, and similar articles.

We are of the opinion that the purchase and consumption of this product were indulgence in a luxury as distinguished from a necessary article of food, and that the regulations (Findings X and XI) defining it as candy were reasonable in their provisions and in conformity with the spirit and intent of the acts, and further that it has not been satisfactorily shown that the product is not "candy" within the intent of the statutes, the burden of so doing being upon the plaintiff.

The plaintiff's petition should be dismissed, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

CRACKER JACK CO v. THE UNITED STATES [1]

[No. F-155. Decided February 4, 1929]

On the Proofs

Excise tax; candy; pop-corn products.—See *Cracker Jack Co.* v. *United States, ante*, p. 89.
Same; Treasury regulations.—Id.
Same; burden of proof.—Id.
Same; tax on luxuries.—Id.
Statutory construction; doubt as to meaning of a word.—Id.

[1] Certiorari denied.

The Reporter's statement of the case:

Mr. Jacob Mertens, jr., for the plaintiff. *Messrs. George E. Holmes* and *Valentine B. Havens*, and *Holmes, Paul & Havens* were on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. On and after January 1, 1919, and prior to March 6, 1922, plaintiff existed as a corporation organized under the laws of the State of New York under the corporate designation of Rueckheim Bros. & Eckstein, Inc.

On March 6, 1922, a certificate was issued in accordance with the laws of the State of New York authorizing the plaintiff to change its corporate name from that of Rueckheim Bros. & Eckstein, Inc., to that of the Cracker Jack Co., Inc., the original corporation continuing in existence, and at present existing under such changed corporate designation.

II. The plaintiff was engaged in the manufacture and sale of pop-corn products in the city of New York, N. Y., at all the times referred to herein.

III. The said pop-corn products manufactured and sold by plaintiff were Cracker Jack (also a similar product called Chums), pop-corn balls, and pop-corn bricks.

IV. The said pop-corn products manufactured and sold by the plaintiff consisted of pop corn with a thin coating of syrup which is composed of corn syrup, raw sugar, with the addition of molasses in the case of Cracker Jack (and Chums).

V. The process through which Cracker Jack passes is as follows: The pop corn, after being gathered from the field, is cured and shelled. At the manufacturing plant the shelled corn is popped and screened to remove unpopped or partly popped kernels. It is then measured and placed in mixing tubs. A syrup consisting of dissolved sugar, corn syrup, and molasses is then placed in a kettle and cooked eight or nine minutes, being agitated constantly. A small quantity of peanuts is added to the syrup before cooking. After the

syrup is cooked it is poured into the mixing tub containing the proper amount of popped corn, and the mixture is then placed in reels, where it is allowed to cool. The process of mixing and cooling is such that, after cooling, each kernel of popped corn is separated from the mass. The product is then automatically boxed in air and moisture-tight wax-paper cartons.

Pop-corn balls and bricks are prepared similarly, except that there is no molasses in the syrup, and the finished product is formed into a solid mass and wrapped in wax paper.

By weight the finished Cracker Jack was 32.9% popped corn, 8.3% peanuts, and 58.8% sugar, corn syrup, and molasses.

VI. The plaintiff paid Federal excise taxes on these pop-corn products to the Commissioner of Internal Revenue for the period from February 25, 1919, to July 2, 1924, in accordance with the requirements of the regulations issued by the Commissioner of Internal Revenue.

VII. During the period from 1918 to 1924, inclusive, the leading manufacturers of pop corn and pop-corn confectionery in the United States were Rueckheim Bros. & Eckstein (the Cracker Jack Co.), Shotwell Manufacturing Co., and D. L. Clark & Co. These three companies manufactured and sold during this period over 90 per cent of the pop corn and pop-corn confectionery manufactured.

VIII. Following the enactment of the revenue act of 1918, February 24, 1919, the Commissioner of Internal Revenue commenced the formulation of regulations interpreting the excise-tax provisions of that act. After several informal conferences a formal hearing was held with representatives of the National Confectioners Association, which included approximately four-fifths of the candy manufacturers in the United States, at which the commissioner was represented by Mr. John E. Walker, Deputy Commissioner of Internal Revenue, who, as clerk of the House Ways and Means Committee, was in a general way familiar with the proceedings before that committee on the same subject matter, by the Solicitor of Internal Revenue, and by a lawyer in the office of the Solicitor of Internal Revenue. At this hearing the

National Confectioners Association suggested a definition of candy, and the regulations for the enforcement of the statute, hereinafter recited, were in substantial conformity with the definition suggested.

IX. Regulations 47 interpreting the excise-tax provisions of the revenue act of 1918 were approved May 1, 1919, and were effective as of February 25, 1919.

X. Article 22 of Regulations 47 (approved May 1, 1919) reads in part as follows:

"Candy within the meaning of the act includes chocolate creams, bonbons, gumdrops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glacé or candied fruits and nuts, pop corn and other cereals or cereal products mixed with or covered with molasses, sugar, or other sweetening agent, hard candies, plain and chocolate-covered marshmallows, candy cough drops and sweetened licorice not taxed as cough drops, sweet chocolate and sweet-milk chocolate, whether plain or mixed with fruits or nuts, and all similar articles however designated. It does not include, however, cereal breakfast foods, cake, and pastries, nor bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste. If a manufacturer of glacé or candied fruits at the time the goods are shipped or sold (whichever is prior) has in his possession an order or contract of sale with certificate of the purchaser printed thereon or in writing and permanently attached thereto, showing that such fruits so purchased are to be used in the manufacture of food products, such as ice cream, cakes, and pastries, the sale thereof shall not be taxable. Where a manufacturer of candy sells in connection with the sale of his own product candy which he has bought from another manufacturer and on which he has performed no further process of manufacture the tax attaches only to such portion of the goods sold as have been manufactured by him."

XI. Article 22 of Regulations 47 revised (approved December 27, 1920) reads, in part, as follows:

"Candy within the meaning of this subdivision—

"(a) Includes chocolate creams, bonbons, gumdrops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered

fruits and nuts, glacé or candied fruits and nuts not specified in paragraph (b) of this subdivision; pop corn and other cereals or cereal products, not specified in paragraph (b) of this subdivision, mixed with or covered with molasses, sugar, or other sweetening agent; hard candies; plain and chocolate-covered marshmallows; candy cough drops sold in bulk and without remedial claims (see art. 16, Regulations 51); sweetened licorice not taxed as cough drops under Section 907; sweet chocolate and sweet-milk chocolate, whether plain or mixed with fruit or nuts, not specified in paragraph (b) of this subdivision; maple sugar mixed with fruit, nuts, etc., not specified in paragraph (b) of this subdivision; and all similar articles however designated; but

"(b) Does not include cereal breakfast foods, cake and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste, powdered chocolate, maple sugar or sirup not mixed with nuts, etc., marshmallow paste, glacé or candied fruit peel and citron, or sweet chocolate, glacé or candied fruits and nuts sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing, or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold.

"Where a manufacturer sells candy which is packed or put up for sale in a fancy or plain box or container the tax is computed upon the selling price of the candy and container, whether the container is billed separately or not. However, where candy is purchased and the purchaser selects a fancy box or container in which the candy is placed the tax attaches to the selling price of the candy and not to the cost of the box. In such cases, if the sale is billed, the container and candy must be billed as separate items."

XII. Article 19 of Regulations 47 revised (approved January 6, 1922) is substantially identical in its pertinent provisions with the provisions of article 22 of Regulations 47 revised (approved December 27, 1920).

XIII. The pop-corn products of this company come within the terms pop corn and pop-corn confectionery.

XIV. Beginning with the month of February, 1919, and monthly thereafter plaintiff filed with the collector of internal revenue for the first district of New York, on the forms provided by the Commissioner of Internal Revenue for that purpose, returns for each of the months from Feb-

ruary, 1919, to August, 1923, both inclusive, showing the amount of sales of Cracker Jack, pop-corn balls, and pop-corn bricks for each of said months, respectively, and computed a tax thereon at the rates then in force as excise tax on the sale of candy.

The tax so computed under each of said returns was thereafter paid by plaintiff to the collector of internal revenue for the first district of New York, and by said collector turned over to the United States, which still retains the same.

XV. The amount of the taxes so paid, together with the respective dates of payment, and the particular month for the sales of which the taxes were paid, are set forth in a statement annexed to the petition as Exhibit A, and made a part of this finding by reference.

XVI. On December 31, 1923, the plaintiff filed with the collector of internal revenue, first district, New York, a claim for refund in the amount of $37,000 covering payments made from May 29, 1919, to July 30, 1920, for the taxes due for the period from February 25, 1919, to June 30, 1920, both inclusive.

XVII. On August 22, 1924, plaintiff filed with the collector of internal revenue, first district, New York, a statement supplementing the said claim filed December 31, 1923, and reducing the amount thereof from $37,000.00 to $17,-525.58, which reduction was made for the purpose of excluding taxes paid from May 29, 1919, to October 24, 1919, both inclusive, the recovery of which amounts was regarded as barred by the statute of limitations.

XVIII. On or about August 22, 1924, the plaintiff filed with the collector of internal revenue, first district, New York, a claim for refund in the amount of $85,577.45, covering payments made from August 30, 1920, to September 29, 1923, for taxes due for the period from July, 1920, to August, 1923, both inclusive.

XIX. All of said refund claims were based upon the alleged erroneous classification and taxation by the Commissioner of Internal Revenue of the pop-corn products of the plaintiff as candy.

XX. The said refund claims were rejected by the Commissioner of Internal Revenue at the times and on the schedules indicated:

Amount	Schedule No.	District	Date schedule forwarded to collector
$37,000.00 (reduced to $17,525.58)	1301	1st dist. N. Y.	Feb. 27, 1926
$85,577.45	1178	1st dist. N. Y.	Nov. 28, 1925

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This is a companion case to the *Cracker Jack Co. case*, No. F-97, this day decided. [*Ante*, p. 89.] They were heard and submitted at the same time. The principles involved in the two cases are the same, and this case is controlled by the principles announced in that case.

The petition should therefore be dismissed, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

ULLMAN MANUFACTURING CO. v. THE UNITED STATES

[No. H-306. Decided February 4, 1929]

On the Proofs

Income and profits taxes; affiliated companies; consolidated returns; community of interest.—Actual control, by the same interests, rather than mere percentage of ownership, determines the question of affiliation of corporations, sec. 240, revenue act of 1918.

The Reporter's statement of the case:

Mr. Milton Strasburger for the plaintiff. *Mr. Joseph J. Klein* was on the briefs.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Ullman Manufacturing Company, was and is a corporation duly organized under the laws of the State of West Virginia, having its principal place of business in Long Island City, New York.

II. The capital stock of said corporation, during the year 1919, consisted of 300 shares of common stock, of the par value of $100 per share, and 300 shares of preferred stock of the par value of $100 per share. Its invested capital during said year was $146,796.94.

III. Plaintiff was and is engaged in the manufacture and sale of pictures, picture frames, and other like articles.

IV. On March 15th, 1920, plaintiff filed its income and excess-profits tax return for the calendar year ending December 31st, 1919, and paid to the collector of internal revenue the tax shown by said return.

V. Prior to 1910 there existed a partnership known as Fishel, Adler & Schwartz engaged in the same business as petitioner. Two of the three partners constituting said partnership had died prior to 1910, and thereafter the business was carried on by A. A. Fishel, the surviving partner, until August, 1910, when he was adjudged a bankrupt.

VI. In December, 1910, the petitioner purchased from the trustee in bankruptcy of Fishel, Adler & Schwartz the entire assets of said business for the sum of $35,000.00.

VII. In January, 1911, a corporation by the name of Fishel, Adler & Schwartz Co., Inc., was organized under the laws of the State of New York. Thirty-five thousand dollars ($35,000.00) of preferred stock and $35,000.00 of common stock were issued to plaintiff in payment for such assets.

VIII. Upon incorporation of said company, A. A. Fishel was employed by Fishel, Adler & Schwartz Co., Inc., as a salesman, at a salary of $60.00 per week, and was given 70 shares of the common stock of said company, being 20 per cent of the common stock authorized and issued. He was made secretary and director of the company. It was not considered at this time that said stock had any pecuniary value.

IX. Said stock was given to Fishel by the plaintiff at the time of his employment, in lieu of larger compensation, in order to encourage him to make the company a success, and with the understanding and agreement that if he should be discharged or should resign his position, he would sell the said shares of stock at a reasonable price to the plaintiff. Either party could discontinue the employment upon a week's notice.

X. Owing to certain financial difficulties in which Fishel was involved at the time of his employment, the 70 shares of stock on July 31st, 1911, were issued to the Ullman Manufacturing Company, to be held for Fishel. On February 4th, 1913, this certificate was canceled and a new certificate for 70 shares was issued to Caroline Fishel, wife of A. A. Fishel, who held the same until December 12th, 1921, when said stock was purchased from her by plaintiff for $300.00. Mrs. Fishel had no beneficial ownership in said stock, but held same solely in trust for her husband. At no time did Fishel or Mrs. Fishel differ in any degree with the owners of the majority stock in the management or policy of the business.

XI. A. A. Fishel, on February 26th, 1919, resigned his position with Fishel, Adler & Schwartz Co., Inc., and also at that time resigned as a director of the company, said resignation to take effect at once.

XII. After the acquisition of the assets and business of the Fishel, Adler & Schwartz Co., same were removed to the general office and headquarters of plaintiff company, and at all times thereafter the two businesses were conducted in the building occupied by plaintiff, and were managed and controlled by the same officers and directors, except that A. A. Fishel, who occupied the position of secretary, and was a director of the Fishel Company, had no official connection with plaintiff company. The Fishel company paid $60.00 per month as rental for the space occupied by it, which was regarded by the parties concerned as a nominal rental. It used the telephone service and exchange provided by plaintiff without charge, and availed itself of plaintiff's shipping facilities, consisting both of labor and shipping

materials, also without charge. Plaintiff's salesmen obtained orders for the Fishel Company's products, and likewise the Fishel Company's salesmen obtained orders for plaintiff's products, without adjustment as to compensation. All incidental expenses, such as light, heat, power, and elevator service were borne by plaintiff. The Fishel Company, which had no financial credit, obtained needed loans, from time to time, on the credit and by the endorsement of plaintiff company.

XIII. The Ullman Manufacturing Company owned all of the preferred stock and 80 per cent of the common stock of the Fishel, Adler & Schwartz Co., Inc.

XIV. On March 15th, 1920, the Ullman Manufacturing Company filed a consolidated return of income and excess-profits taxes for the year 1919, payable on the combined income of plaintiff and the Fishel, Adler & Schwartz Co., Inc.

XV. On April 16th, 1921, E. H. Batson, acting deputy commissioner of internal revenue, mailed a letter to plaintiff, advising it that the two corporations were affiliated and that consolidated returns should be filed.

XVI. On February 26th, 1925, J. G. Bright, deputy commissioner of internal revenue, mailed a letter to plaintiff, reversing the former ruling and holding that said corporations were not so affiliated.

XVII. Plaintiff appealed to the United States Board of Tax Appeals from the determination of a deficiency in income and profits tax in the amount of $5,804.51 for the calendar year 1919, arising from the refusal of the commissioner to permit the taxpayer and Fishel, Adler & Schwartz Co., Inc., to file a consolidated return. On November 11th, 1925, the Board of Tax Appeals approved the determination of the Commissioner of Internal Revenue to the effect that the taxpayer and Fishel, Adler & Schwartz Co., Inc., were not affiliated for the year 1919, resulting in the approval of the commissioner's determination that the taxpayer be assessed at $12,606.40, which was an assessment of $5,804.51 greater than the tax which would have been due from the plaintiff if the corporations had been permitted to report on the basis of a consolidated return.

The court decided that plaintiff was entitled to recover $5,804.51, with interest from December 4, 1925.

MOSS, *Judge*, delivered the opinion of the court:

The plaintiff, Ullman Manufacturing Company, a corporation, was engaged in the business of manufacturing picture frames and publishing pictures and art printing. Fishel, Adler & Schwartz, which prior to 1910 was a partnership, had been engaged in the same character of business. In December, 1910, plaintiff purchased at a bankruptcy sale the assets and business of said partnership for the sum of $35,000.00. In January, 1911, a corporation by the name of Fishel, Adler & Schwartz Company, Incorporated, was organized, and $35,000 of preferred stock and $35,000 of common stock were issued and delivered to plaintiff in payment for such assets.

On March 15, 1920, plaintiff filed a consolidated return of income and excess-profits for the year 1919, claiming that the two concerns were affiliated companies within the meaning of section 240 (b) of the revenue act of 1918. The commissioner determined that the companies were not affiliated. Thereafter plaintiff filed with the commissioner what is called in the record an affiliated corporation questionnaire upon blanks furnished by the Bureau of Internal Revenue for the taxable years 1917, 1918, and 1919. Plaintiff was thereafter notified by letter from the acting Deputy Commissioner of Internal Revenue that upon the basis of the facts set forth in said questionnaire the companies were affiliated, and that a consolidated return should be filed for said years. Subsequently, on February 26, 1925, the commissioner determined that said companies were not affiliated, and an additional tax was assessed against plaintiff in the sum of $5,804.51. On appeal by plaintiff to the United States Board of Tax Appeals the ruling of the commissioner was approved. This action was instituted for the recovery of said sum.

It is plaintiff's contention that the commissioner erred in holding that plaintiff and Fishel, Adler & Schwartz Company, Incorporated, were not affiliated within the meaning of section 240 of the act of 1918, and in refusing to compute

the tax upon the basis of a consolidated return. Plaintiff makes the further contention that the commissioner was without authority to reverse the ruling of his predecessor in office. The applicable provisions of the act of 1918 are as follows:

"SEC. 240. (a) That corporations which are affiliated within the meaning of this section shall, under regulations to be prescribed by the commissioner with the approval of the Secretary, make a consolidated return of net income and invested capital for the purposes of this title (Income Tax) and Title III (War Profits and Excess Profits Tax), and the taxes thereunder shall be computed and determined upon the basis of such return:

* * * * * * *

"(b) For the purposes of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests."

Plaintiff company owned all of the preferred stock and 80 per cent of the common stock of the Fishel Company. The remaining 20 per cent of the common stock was given to A. A. Fishel, of the Fishel Company, as part compensation for his services as salesman for the new Fishel Company, with the agreement that in the event his connection with said company should be severed he would sell said stock to the plaintiff at a reasonable price. After the acquisition of the assets and business of the Fishel, Adler & Schwartz Company, same were removed to the headquarters of plaintiff company and at all times thereafter the businesses of the two companies were conducted in the building occupied by plaintiff, and were managed and controlled by the same officers and directors, except that A. A. Fishel, who was a director and secretary of the Fishel, Adler & Schwartz Company, had no official connection with the plaintiff company. The Fishel Company used the telephone service and exchange provided by plaintiff company without charge, and availed itself of its shipping facilities, also without charge.

Plaintiff's salesmen obtained orders for the Fishel Company's products, and likewise, the salesmen of the Fishel Company obtained orders for plaintiff's products without any adjustment as to compensation. The Fishel Company, which had no financial credit, obtained, from time to time, needed loans on the credit, and by the endorsement, of plaintiff company. All incidental expenses such as light, heat, power, and elevator service, were paid by plaintiff. The only charge whatever against the Fishel Company was a rental of $60 per month for the space occupied by it, and this was regarded by the parties as a nominal rent.

Under the terms of the act of 1918 no specified percentage of stock was necessary in order to bring a company within the operation of the statute. The language, "substantially all the stock," as well as the word, "control," as used in the statute, must be construed in accordance with the facts of the particular case. *United States* v. *Whyel*, 19 Fed. (2d) 260. See also article 633 of the Treasury Regulations. Fishel was a salaried employee of plaintiff company, and could have been peremptorily discharged at any time. He could not sell the stock which had been given to him, except to plaintiff company. The business of the two companies was not merely similar in character, but it was identical in all respects. It was under the same *management* and *control*, and all of the stock was actually controlled "*by the same interests*." The word, "controlled," mentioned in the statute, means actual control, "regardless of whether or not it is based upon legally enforceable means." *Isse Koch & Co. Inc.'s Appeal*, 1 B. T. A. 624.

The objection on the part of the defendant that the agreement to sell the stock to plaintiff was not a valid and enforceable contract because the terms were indefinite, and because same were not in writing, is not sound. The uncontradicted evidence establishes the existence of the agreement and the terms thereof, and also the fact that Mrs. Fishel, by agreement of all the parties, held said stock in trust for her husband. Defendant has cited no authority to the effect that such an agreement must be in writing. A "reasonable price" means in this case the fair market value of the stock, and that value was easily susceptible of proof.

Both parties recognized the validity of the contract, and the stock was actually sold to plaintiff at a price which was regarded as reasonable.

In an opinion by the Board of Tax Appeals in *Century Music Publishing Co.* v. *Commissioner of Internal Revenue*, decided June 15, 1928, in which three corporations were involved, it was said, "in all the thirty years' existence of these corporations they have been completely dominated, managed, and financed by Leo Feist. They were simply departments of the same business, viz., music publishing, which, for certain trade reasons, were conducted as separate corporate entities. The gifts of small amounts of stock to his brothers and employees, were plainly for the purposes of corporate organization, and as an inducement to greater interest on the part of the employees. In all these years there has been no diverse or antagonistic interest. The business was conducted as an economic and business unit, and the *interests of all were exactly the same*." (Our italics.) In commenting upon the contention by the commissioner that the 80 per cent ownership of the petitioner, Leo Feist, was not sufficient, the Board stated, "but the fallacy in this is, that the statute does not require ownership or control in one individual. Ownership or control of substantially all of the stock of two or more corporations, may rest in one or more individuals, or in a group of individuals, the only requirement being that *they represent the same interests*." (Our italics.) In the case of *Midland Refining Company*, 2 B. T. A. 292, it was stated, "a careful examination of the stockholdings, and the relation existing between the various stockholders, shows that substantially all of the stock is owned or controlled by the same individuals. It seems to follow, naturally, if a group of individuals owns or controls substantially all of the stock of both corporations, and if such ownership or control is by all exercised for one purpose, namely, the *joint success* of the *corporations*, that these individuals meet the requirements of the words, "the same interests." In *Appeal of the Kolynos Company*, 4 B. T. A. 520, it was said, "The officials and directors of the concerns were the same persons, except as disclosed in the findings of

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fact above. The stockholders were the same. The stockholders who owned stock in one, and not in the other, were closely drawn together by ties of blood, *friendship* and *interests*." (Our italics.) These corporations were held to be affiliated.

It is clear from an examination of the authorities cited, and others not appearing on the briefs, that the mere percentage of ownership is not decisive of the question of the application of the statute under discussion. The important factor is that of control "*by the same interests*," and that means *actual* control.

We have reached the conclusion that under the facts in the instant case plaintiff and the Fishel, Adler & Schwartz Company were affiliated concerns within the meaning of the statute, and as such were entitled to file consolidated returns. In view of this conclusion it will not be necessary to determine whether or not the commissioner is without authority to reverse the ruling of his predecessor in office on the question at issue here.

Plaintiff is entitled to judgment in the sum of $5,804.51, and it is so adjudged and ordered.

SINNOTT, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

GREEN, *Judge*, concurs in the result.

YORKVIEW FINANCE CORPORATION v. THE UNITED STATES

[No. H-205. Decided February 4, 1929]

On the Proofs

Eminent domain; just compensation.—Just compensation determined and allowed for the taking of 83 acres, subdivided into lots and sold by plaintiff to various purchasers whose contracts of sale were not recorded. Payment of judgment suspended until title is cleared. See *Yorkview Finance Corp.* v. *United States*, 60 C. Cls. 646.

The Reporter's statement of the case:

Mr. Allan D. Jones for the plaintiff.

Mr. Dan M. Jackson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is now, and was during all of the times hereinafter mentioned, a corporation duly organized and existing under the laws of the State of Virginia, with its principal office in the city of Norfolk, Virginia.

II. On and prior to November 8, 1918, plaintiff was the sole owner of the following described real estate, situated in York County, Virginia, which it had theretofore platted into blocks, lots, streets, and alleys:

All that certain tract of land in Bruton district, York County, Virginia, containing 765¼ acres, known as "Lansdown" and shown and designated on sheet 2 of the Government Survey Y. & D.-87046, as parcel 2, together with riparian rights, said tract being bounded in part by King's Creek and Felgate's Creek, excepting therefrom lots of land containing about 83 acres, sold to sundry parties as hereinafter mentioned in these findings.

III. Plaintiff acquired title to this property from D. L. Flory and wife, by deed dated May 15, 1918, duly recorded in the clerk's office of the Circuit Court of York County, Virginia, in D. B. 35 a, at page 597. The total consideration for same was the sum of $35,000, of which $9,000 was evidenced by the assumption of two mortgages upon the property and the giving to Mr. Flory of a mortgage of $26,000 secured by purchase price deed of trust to L. A. MacMurran, trustee, to secure three notes aggregating $26,000. The mortgages aggregating $9,000 were paid off and the $26,000 evidenced by the deed of trust was paid off with monies received by the plaintiff from the United States Government out of the payment to the plaintiff of 75 per centum of the original award of the Board of Valuation of Commandeered Property.

IV. The property was acquired by the Yorkview Finance Corporation for the purpose of subdividing and selling lots for the building of dwellings and business houses at a point just south of Penniman Plant, an enterprise of the Du Pont Powder Company, established for the manufacture of explosives and munitions of war. Plaintiff laid off the property into lots, blocks, sections, and streets, which cost approximately $1,000 or more, paid to the surveyor for surveying the land. Plats and blue prints were prepared and prices established. No streets were graded, although right of way had been cut through for the streets. No sewer, water main, or electricity had been installed. The property was offered for sale upon terms of one-fourth cash and the balance in two, four, and six months, evidenced by written contracts and notes executed for same. Eighty-three acres of the land were sold to purchasers described in Exhibit 2, filed with plaintiff's petition, and made a part of this finding by reference.

V. The President of the United States issued a proclamation dated August 7, 1918, as modified by proclamation of November 2, 1918, requisitioning the aforesaid property of plaintiff, said proclamation being issued in accordance with the provisions of the act of Congress of July 1, 1918 (40 Stat. 704, 722), title to the property being vested in the United States on September 7, 1918, of which the plaintiff was notified November 8, 1918.

VI. Thereafter a Board of Valuation of Commandeered Property of the Navy Department, after hearing, reported that just compensation for the aforesaid 765¼ acres was $35,000. No award of just compensation for the 83 acres of land that had been sold, as herein mentioned, was made covering the interest of the sundry purchasers for the same. On September 7, 1918, the date the title to the property became vested in the United States, there was no record on the deed records of York County indicating that the contract holders had any interest in said property. The contracts of sale were not recorded. However, the lot owners presented their claims to the Board of Valuation, but no award was made to them.

Reporter's Statement of the Case

VII. The President of the United States determined in pursuance of the act of Congress aforesaid, upon the report of the Board of Valuation, that just compensation for the said property was $35,000.

VIII. The amount of $35,000 so determined and awarded by the President of the United States was unsatisfactory to plaintiff, and plaintiff in pursuance of the provisions of the act aforesaid demanded and received from the Government 75 per centum of the amount fixed by the President as just compensation for the property; that is to say, $26,250 was paid on the 10th day of June, 1921.

IX. The Navy Department requested a receipt to be executed not only by the plaintiff but also by all the contract purchasers who were alleged to have an interest in the land. The receipt tendered by plaintiff disclosed that same had not been executed by all of the alleged contract holders, whereupon the Navy Department required plaintiff to execute a bond to protect the United States against any claim that might be made by such alleged contract holders as did not execute the receipt and also to protect the United States against any claims arising out of proposed settlement that might be made by E. L. Beale, formerly attorney for plaintiff, who had asserted a lien against the monies due plaintiff in the sum of $3,500, for attorney's fees. The bond referred to was transmitted to the Navy Department on June 2, 1921, and thereafter on June 10, 1921, the sum of $26,250, 75 per centum of the award, was paid. The claim of E. L. Beale was paid in full before the filing of this action.

X. On September 7, 1918, plaintiff had sold to sundry persons 78 parcels of said tract by reference to lot and block number of plat, for a total consideration of $30,950, having made contract therefor, the purchasers paying one-fourth cash and giving their interest-bearing notes payable two, four, and six months after date for the balance in equal installments. Plaintiff had received the sum of $19,520 payments on all of the above-mentioned contracts exclusive of interest.

XI. Shortly thereafter on, to wit, October 8, 1921, the plaintiff filed its petition in the Court of Claims alleging, among other things, that it was the owner of the entire tract

but that at the time of the taking by the Government, it had theretofore sold 83 acres thereof and asked judgment of the court for just compensation for 682¼ acres of land. The suit was had and judgment entered on May 4, 1925, and reported in 60 C. Cls. 646. The court in its seventh finding of fact held: "The fair cash value of the land and riparian rights excluding the 83 acres sold was on the 8th day of November, 1918, the sum of $58,560."

XII. After having received the amount of the judgment above-mentioned plaintiff paid to its trustee, Allan D. Jones, $19,545, with the provision that the said trustee would repay to the lot purchasers the amounts paid by them on their several contracts. In pursuance of this agreement the said trustee has at this time repaid to the lot purchasers the amounts paid by them, with the exception of three of said parties, one of whom, Eugene Maurice, is out of the United States and his address unknown; another, Anna Elman, has removed to the western part of the United States and has not been located after diligent search; and the funds of the third party have been attached, and the case is now pending in the court of Virginia. A copy of the settlement of the trustee made with lot purchasers is attached to plaintiff's petition, marked "Exhibit 4," and made a part of this finding by reference.

XIII. From early in 1920 until January 6, 1927, plaintiff had been negotiating with the Navy Department for settlement of its claims in connection with the commandeering of "Lansdown." On January 6, 1927, the Navy Department in a letter to the plaintiff stated that it would initiate steps to determine just compensation for the 83 acres, but later and on May 3, 1927, a letter was addressed to the Yorkview Finance Corporation by the Secretary of the Navy wherein the position was taken that the Navy Department was without authority to make any further award in the case; that the original award of approximately $50.00 per acre was for the whole tract, and that the fact that the Court of Claims had offset against the judgment awarded in the former case the full payment of $26,250 did not necessitate further action upon the part of the Navy Department.

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XIV. At the time the Yorkview Finance Corporation received 75 per centum of the award a receipt for the same was executed by the Yorkview Finance Corporation and the purchasers of the lots, which receipt contained the following provision:

"* * * it being understood that the acceptance of said sum of twenty-six thousand two hundred and fifty dollars ($26,250.00) will in no manner whatsoever affect their right to sue the United States in accordance with the provisions of the act of Congress aforesaid to recover such further sum as added to said twenty-six thousand two hundred and fifty dollars ($26,250.00) will make up such amount as will be just compenstaion for the said property taken over."

XV. On September 7, 1918, the reasonable market value of the 83 acres of land herein sued for was the sum of $85.83 per acre, or a total sum of $7,123.89.

The court decided that plaintiff was entitled to recover.

MEMORANDUM BY THE COURT

We hold that there is no question, as suggested by the defendant, of the statute of limitations in this case and that it does not apply. The property was taken and the only question is the amount of compensation. The value of the property has been fixed by the findings at $7,123.89, and for this amount judgment should be entered.

Inasmuch as it appears that several of the parties who purchased lots have not released their interest in the land, the payment of this judgment is suspended until the title to the property has been cleared and title to the 83 acres involved has been approved by the Attorney General.

RIVERSIDE MANUFACTURING CO. v. THE UNITED STATES [1]

[No. F-324. Decided February 4, 1929]

On the Proofs

Income and profits taxes; inventories; determination of basis by Commissioner of Internal Revenue.—The basis upon which inven-

[1] Certiorari denied.

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tories are to be taken for the purpose of ascertaining gain or loss under the revenue acts is within the discretion of the Commissioner of Internal Revenue and the Secretary of the Treasury, and where they do not permit the deduction of trade discounts or selling commissions from inventory values their action in the matter, in the absence of abuse of discretion, is not reviewable by the court.

The *Reporter's* statement of the case:

Mr. James Craig Peacock for the plaintiff.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. D. A. Taylor* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff herein, Riverside Manufacturing Company, is and was, at all times hereinafter stated, a corporation organized and existing under the laws of the State of South Carolina, with its principal office at Anderson, South Carolina, and engaged in the manufacture of cotton yarns.

II. Plaintiff made and filed its corporation income and profits tax return for the calendar year 1920 on March 16, 1921, showing thereon a tax liability for income and excess-profits tax in the sum of $103,632.43; said tax was paid in four installments, as follows: $25,908.11 paid March 16, 1921; $25,908.11 paid June 17, 1921; $25,908.11 paid September 15, 1921; $25,908.10 paid December 16, 1921.

III. On February 28, 1925, certificate of overassessment No. 816672 in the sum of $16,654.58 was approved by the Commissioner of Internal Revenue and the same was scheduled for payment on schedule No. 14105, dated March 14, 1925. Of this said amount of $16,654.58, the sum of $13,800 was credited to an outstanding balance of tax due by the plaintiff for the year 1919, and the balance of $2,854.58, plus interest of $3,099.82, was refunded to the taxpayer. The allowances as shown in said certificate of overassessment were based upon grounds other than the deduction of selling commissions and discounts as contended for herein by the plaintiff.

IV. On or about May 18, 1925, a claim for refund in the sum of $75,000, based on corporation income and profits taxes

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for the calendar year 1920, was filed by the taxpayer with the Commissioner of Internal Revenue.

V. On October 24, 1925, certificate of overassessment No. 863448 in the sum of $1,057.32 was approved by the Commissioner of Internal Revenue and the same was scheduled for payment on schedule No. 17264, dated November 16, 1925. This sum of $1,057.32 plus interest of $248.47 was refunded to the taxpayer. The allowances as shown in said certificate of overassessment were based upon grounds other than the deduction of selling commissions and discounts as contended for herein by the plaintiff.

VI. Plaintiff's inventory of finished yarn as of December 31, 1920, the closing date of the year 1920, and incorporated as part of its corporation income and profits tax return for that year, was valued on the basis of actual market quotations as of December 31, 1920, for the reason that market was lower than cost. Said inventory as returned by the plaintiff was in the sum of $228,636.82.

VII. Plaintiff, in computing the said inventory value of $228,636.82, did not take into consideration any selling commissions or trade discounts and nothing was deducted by plaintiff from said inventory value in its income and profits tax return for the year 1920 on account thereof. Plaintiff contends that $17,654.41, representing five per cent and three per cent and two per cent for selling commissions and trade discounts, in accordance with the following table, should have been deducted from said inventory value and that deductions of selling commissions and trade discounts are regular trade practices in arriving at market values:

Inventory value as returned

Anderson Mill (skeins and warps)	$123, 365. 20
Anderson Mill (cones)	30, 904. 12
Pendleton Mill (skeins and warps)	74, 367. 50
Total	228, 636. 82

Inventory value as returned, discounted

5% and 3% of	$123, 365. 20=	$113, 681. 03
5% and 2% of	30, 904. 12=	28, 771. 73
5% and 3% of	74, 367. 50=	68, 529. 65
		210, 982. 41

The difference between the "inventory value as returned"—$228,636.82—and the "inventory value as returned, discounted," as shown in the tabulation—$210,-982.41—is the sum of $17,654.41.

The said amount of $17,654.41 was not in fact paid by plaintiff nor deducted by plaintiff during the taxable year 1920, but said amount represents that sum plaintiff would have had to pay or allow the trade for selling commissions and discounts had the finished goods listed in the said inventory been sold at the returned inventory prices on December 31, 1920.

VIII. Plaintiff has since its organization been continuously engaged in the manufacture of cotton yarns. It is the regular selling practice in the yarn trade that buyers of yarn are allowed a trade discount of 2% or 3% (depending on the kind of yarn), which is deducted from the published quotation. It is also the regular selling practice in the yarn trade for manufacturers to sell their product through commission houses or agents, who receive a selling commission of 5% on the net amount which they receive from the customer (i. e., 5% on the net amount remaining after deducting the 2% or 3% trade discount from the published quotation), and who in turn remit the balance to the manufacturer.

IX. Plaintiff during 1920 and before and since has sold its entire product through a selling agent and in accordance with the above-described trade practices, and it would not have been possible on December 31, 1920, for it to have sold its product at the full published quotations without having had to pay or allow the above-described trade discounts and selling commissions.

X. The plaintiff and the defendant are in accord on the proposition that the plaintiff was entitled to value its inventory at either cost or market, whichever was lower. The inventory involved in this suit was priced at market, inasmuch as the market price of the goods inventoried at the time of the inventory was less than the cost price. If valued at the published quotations of December 31, 1920, the then value of the yarn inventory was $228,636.82. The 2% or 3% trade

discounts and the 5% selling commision on the merchandise valued at the published quotations aggregate $17,654.41. The maximum net amount which the plaintiff could have realized on its finished-yarn inventories of December 31, 1920, if sold at the published quotations of that day, would have been $210,982.41.

XI. At the date of the taking of said inventory—to wit, December 31, 1920—and during the entire taxable year 1920, there was an established market for the sale of plaintiff's finished product.

XII. The Commissioner of Internal Revenue in the certificates of overassessments referred to in Findings III and V above has computed plaintiff's net income for 1920 on the basis of a closing inventory of yarn valued at $228,636.82. In its claim for refund referred to in Finding IV above plaintiff claimed that it should be valued at $210,982.41 as above described, the effect of which would be to reduce its taxable net income for 1920 by $17,654.41, but the commissioner has not allowed said claim.

XIII. If plaintiff's net income is so reduced by $17,654.41, it is entitled to judgment for $8,121.03, with interest from December 16, 1921.

The court decided that plaintiff was not entitled to recover.

SINNOTT, *Judge*, delivered the opinion of the court:

The question herein is whether market quotations used as a basis of fixing inventory values at market should be reduced by trade discounts and selling commissions. This case was referred to a commissioner of this court for a finding and report to the court of the facts. No exceptions thereto were filed by either party. The court, after an examination of the evidence, has adopted the findings of the commissioner.

Plaintiff's inventory of finished yarn as of December 31, 1920, the closing date of the year 1920, and incorporated as a part of its corporation income and profits tax return for that year, gave a valuation of $228,636.82 on the basis of actual market quotations as of December 31, 1920, for the reason that market was lower than cost. Plaintiff in computing the inventory value of $228,636.82 did not take into consideration

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any selling commissions or trade discounts, and nothing was deducted by plaintiff from said inventory value in its income and profits tax return for the year 1920 on account thereof.

Plaintiff contends that $17,654.41, representing 5%, 3%, and 2% for selling commsisions and trade discounts in accordance with the table set forth in Finding VII, should have been deducted from said inventory value, for the reason that deductions of selling commissions and trade discounts are regular trade practices in arriving at market valuation. If plaintiff's inventory is reduced by $17,654.41 on account of selling commissions and trade discounts, its net income will be correspondingly reduced, and it would be entitled to a refund of $8,121.03 as a reduction in the amount of the closing inventory for any closing year causes a reduction of like amount in taxable net income.

It may be well to remark here that said sum of $17,654.41 was not in fact paid by plaintiff, nor deducted by plaintiff during the taxable year 1920, but said amount represents that sum plaintiff would have had to pay or allow the trade for selling commissions and trade discounts had the finished goods listed in the said inventory been sold at the returned inventory prices on December 31, 1920, as is shown in Finding VII. It is the regular selling practice in the yarn trade, such as is herein involved, that buyers of yarn are allowed a trade discount of 2% or 3% and also it is the regular practice in the yarn trade for manufacturers to sell their products through commission houses or agents, who receive a selling commission of 5% on the net income, which they receive from the customer.

The following sections of the revenue act of 1918 (40 Stat. 1060), are applicable:

"BASIS FOR DETERMINING GAIN OR LOSS

"SEC. 202. (a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—

"(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and

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"(2) In the case of property acquired on or after that date, the cost thereof; or the inventory value, if the inventory is made in accordance with section 203.

* * * * *

"INVENTORIES

"SEC. 203. That whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income."

Said section 203 was reenacted verbatim in section 203 of the revenue act of 1921. (42 Stat. 231.)

In accordance with the authority conferred in said section 203, the following pertinent regulations relating to inventories were promulgated by the commissioner, with the approval of the Secretary:

"The basis of valuation most commonly used by business concerns and which meets the requirements of the Revenue Act is (a) cost or (b) cost or market, whichever is lower. (For inventories by dealers in securities, see article 1585.) Any goods in an inventory which are unsalable at normal prices or unusable in the normal way because of damage, imperfections, shop wear, changes of style, odd or broken lots, or other similar causes, including secondhand goods taken in exchange, should be valued at bona fide selling prices less cost of selling whether basis (a) or (b) is used * * *." (Article 1582, Regulations 62.)

"*Inventories at market.*—Under ordinary circumstances, and for normal goods in an inventory, 'market' means the current bid price prevailing at the date of the inventory for the particular merchandise in the volume in which usually purchased by the taxpayer, and is applicable in the cases (a) of goods purchased and on hand, and (b) of basic elements of cost (materials, labor, and burden) in goods in process of manufacture and in finished goods on hand; * * *." (Article 1584, Regulations 62.)

Plaintiff's inventory of its finished yarn was valued by it on the basis of actual market quotations as of December 31, 1920. This valuation was in compliance with the regulations, articles 1582 and 1584, *supra.* These regulations make

no provision for the deduction of trade discounts or selling commissions for products such as the plaintiff's yarn, for which there was an established market, as is shown in Finding XI.

We are asked, in effect, to amend the said regulations of the commissioner, approved by the Secretary, so that said regulations may include deductions for selling commissions and trade discounts. It seems to us, both from the language of the statute in question and from the statement of the managers on the part of the House at the conference on the disagreeing votes of the two Houses when the revenue act of 1918 was passed, that the matter of determining the basis of inventories was one specifically confided by Congress to the commissioner and Secretary, and that with respect thereto power discretionary in character was necessarily conferred, and that their action can not be reviewed by this court in the absence of abuse of discretion on the part of the commissioner and Secretary.

Referring to section 203, *supra*, of the revenue act of 1918 the managers on the part of the House at the conference made the following statement to the House:

"This amendment provides that inventories for the purpose of determining net income under the income-tax title shall be taken upon the basis determined by the Commissioner of Internal Revenue, as conforming as nearly as may be to the best accounting practice in the trade or business." (Congressional Record, volume 57, part 3, page 2987.)

It appears from the above statement of the managers that the inventory shall be taken upon the basis *determined* by the commissioner. This point is further made clear by (2) of section 202, *supra*, which provides for the use of inventory values if the inventory is made in accordance with section 203. It seems clear from the language of section 203 that the basis of the inventory was one explicitly confided by Congress to the commissioner, and to the Secretary. It is true that the commissioner, in section 203, is directed to conform the inventories "as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income." The language quoted is directory and not mandatory, and obviously confides to the

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commissioner and Secretary the ascertainment of the best accounting practice in the trade or business. Article 1582 of regulations, *supra*, specifically points out "The basis of valuation most commonly used by business concerns and which meets the requirements of the revenue act is (a) cost or (b) cost or market, whichever is lower." It is further pointed out in article 1584, *supra*, "Under ordinary circumstances, and for normal goods in an inventory 'market' means the current bid price prevailing at the date of the inventory * * *."

We can not escape the conclusion drawn from the language of the statute itself that the basis of the inventories was one peculiarly confided to the commissioner; that to him was left the ascertainment "of the best accounting practice in the trade or business," which necessarily involves an examination of the practice of many business concerns, a task difficult for the courts, and one, which if entered upon by the courts, would, no doubt, result in many different bases for inventories, which at the best are not authentic in determining income, but can only approximate it within certain limits.

We believe the views herein set forth are sustained in *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, decided June 4, 1928, by the Supreme Court.

We conclude that the commissioner was correct in rejecting the claim for the refund. Petition will be dismissed. It is so ordered and adjudged.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

ANNIE C. VANDIVER, DOROTHY C. VANDIVER, AND ROBERT M. VANDIVER v. THE UNITED STATES

[No. C–1081. Decided February 4, 1929]

On the Proofs

Eminent domain; just compensation.—Just compensation determined and allowed for the taking of the means of ingress and egress to and from plaintiff's land, in the establishment of the Aber-

deen Proving Ground, measured by the difference between the market values of said land before and after taking of said means of ingress and egress, together with interest.

The Reporter's statement of the case:

Mr. Horace S. Whitman, for the plaintiffs. *Mr. Stevenson A. Williams* was on the briefs.

Mr. William W. Scott, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact as follows:

I. On October 16, 1917, plaintiffs were, and had been for many years previous thereto, the owners in fee simple title of a tract of land containing 350 acres more or less, known as the Middle Island Farm on Spesutia Island, Harford County, Maryland.

II. Spesutia is the name of an island in the west side of Chesapeake Bay, Harford County, Maryland, just south of the mouth of the Susquehanna River. Spesutia Island contains approximately 1,900 acres of land. Title to all of it was formerly in one owner, but many years previous to October, 1917, it was divided into three separate farms, namely, the Lower Island Farm, the Middle Island Farm, and the Upper Island Farm. The Lower Island Farm, containing approximately 1,000 acres, was at the southern end of Spesutia Island, and was in October, 1917, owned by the estate of Robert H. Smith, deceased. The Middle Island Farm contained approximately 350 acres in the center of Spesutia Island, and was in October, 1917, owned by plaintiffs herein. The Upper Island Farm, containing about 500 acres at the northern end of Spesutia Island, was in October, 1917, owned by a corporation, the stock of which was owned and controlled by clubmen and sportsmen residing in New York City and elsewhere, and was used by them as a game preserve and hunting ground. Each of the farms extended across the island from the Chesapeake Bay on the one side to a channel of water about 900 feet in width, known as Spesutia Narrows. The Lower and Middle Farms on Spesutia Island had for more than one hundred years been cultivated and were very fertile and highly productive.

Aberdeen was the nearest town and railroad point to the island and from 1816 to 1917 access to the island had been by public road to a private road, thence to the mainland side of Spesutia Narrows to a landing, by ferry across the Narrows, and thence by a private road running from one end of the island to the other, through the three farms.

The owners of the Lower Island Farm had since 1816 been the owners of the fee simple title of thirty-five acres of land more or less, on the mainland opposite the northwestern corner of Spesutia Island, consisting of thirty acres of land on Woodpecker Point, and a road one mile long leading therefrom to the public county road. In the year 1816 one Robert Smith, who was the then owner of the Lower Island Farm on Spesutia Island, acquired the thirty-five-acre tract on the mainland, opposite the northwestern corner of Spesutia Island, and the road leading therefrom to the public county road, by deed, at which time the said Robert Smith made the following declaration in writing, and recorded the same, with the deed, in the land records of Harford County:

"Mem. All the lands and tenements contained in this deed are held by me for the use and benefit of Benedict W. Hall, Edward G. Williams, and Samuel Smith, their respective heirs and assigns as proprietors of the several parts of Spesutia Island, so that the several proprietors of said island may at all times have the free use of the same. As witness my hand this thirteenth day of August in the year eighteen hundred and sixteen.

"R. SMITH."

For more than one hundred years previous to October, 1917, the owners of the lands on Spesutia Island, jointly with the County Commissioners of Harford County, Maryland, maintained for their use a ferry, which was operated from the Upper Island Farm to the mainland; and maintained a residence on the mainland suitable for a home for the ferryman, and containing rooms for the accommodation of the inhabitants of the island and their friends. They also kept and maintained on the mainland stables sufficient to accommodate the horses owned by the inhabitants of the island, and in later years maintained a garage building for automobiles and other vehicles.

From 1816 to October, 1917, the thirty-five acres on the mainland and the roadways above mentioned, together with the ferry operated across Spesutia Narrows, were used by the inhabitants of the island, including plaintiffs in this case, and their grantors, and was the principal means of ingress and egress to and from Spesutia Island for all purposes.

The ferryboat, maintained by plaintiffs and the other owners of the land on Spesutia Island, was of sufficient capacity to enable plaintiffs and the other owners to remove all of their crops and livestock from the island farms to the place of market. In the summer time when the weather was good threshing machinery and other heavy machinery was taken to the island on the ferryboat. In the wintertime, when the Narrows were frozen over and when the water was very rough, the inhabitants of the island could and did occupy rooms in the ferryhouse maintained on the mainland until such times as they could cross on the ferry. At such times they could and did leave their horses and automobiles in the buildings maintained by them on the mainland for such purposes.

III. In October, 1917, and for many years previous thereto, plaintiffs and their grantors were engaged in farming their lands on Spesutia Island. At that time plaintiffs had 155 acres set out in peach trees that were in a high state of cultivation and unusually productive of fruit, due to the character of the soil, the climate, and the proximity to large bodies of water, which made the lands practically free from damage to the fruit by frost. In addition to the peach orchards, plaintiffs raised other crops on their land, consisting of corn, wheat, oats, tomatoes, and garden vegetables, and conducted a general farming business, including the raising of livestock, such as horses, mules, cattle, and hogs. Most of the crops and stock raised on plaintiffs' lands were sold and marketed over the ferry and the right of way on the mainland heretofore mentioned. The labor used on the farm came and went at will over the ferry and land on the mainland.

In addition to farming, plaintiffs used parts of their land for fishing, hunting, and trapping of animals.

During all of the years preceding October, 1917, the only means of access to the island was over the ferry operating across Spesutia Narrows, and by boat from the island to Havre de Grace, Maryland, a distance of about six miles. There was not then, and is not now, any regular boat traffic between Havre de Grace, Maryland, and Spesutia Island, and the cost of operating boats from the island to Havre de Grace was, and is, so great that it makes farming and stock raising on the island prohibitive.

IV. On October 6, 1917, the Sixty-fifth Congress of the United States passed an urgent deficiency appropriation act (40 Stat. chap. 79, pages 345, 352, etc.) providing for the purchase of a proving ground and the payment of damages and losses resulting from the taking over of land for the proving ground. The act further provided:

"That if the land and appurtenances and improvements attached thereto, as contemplated under the foregoing appropriation, can not be procured by purchase, then the President is hereby authorized and empowered to take over for the United States the immediate possession and title, including all easements, rights of way, riparian and other rights appurtenant thereto, or any land selected by him to be used for the carrying out of the purpose named in the aforesaid appropriation. That if said land and appurtenances and improvements shall be taken over as aforesaid, the United States shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum, as, added to the said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. Upon the taking over of said property by the President as aforesaid the title to all such property so taken over shall immediately vest in the United States: *Provided further*, That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to the expenditures authorized hereunder."

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On the 16th day of October, 1917, pursuant to the said act of Congress, the President of the United States issued a proclamation (40 Stat. part 2, page 1707), declaring certain lands in Harford County, Maryland, to be necessary for the establishment of a proving ground, which said lands included all the lands above referred to on the mainland and on Spesutia Island. The proclamation further provided:

"I do further order as to any land, appurtenances and improvements attached thereto, lying within the limits described above, which can not be procured by purchase on or before October 20, 1917, that immediately thereafter possession and title, including all easements, rights of way, riparian and other rights appurtenant thereto, may be taken on behalf of the United States by the Secretary of War, or his duly accredited representative or representatives, for use for the purposes specified in the said act of Congress, subject to the provisions of said act as to compensation to be paid therefor."

V. In the month of October, 1917, some officers of the United States Army visited Spesutia Island and called at plaintiffs' home on said island, stating that they were there to advise plaintiffs that the Government of the United States had taken over Spesutia Island and directed plaintiffs to vacate therefrom and deliver possession thereof to the United States on or before the 1st day of December, 1917. Plaintiffs immediately verified the statements made by said officers by consulting with the commanding officer of the proving ground, and immediately thereafter accepted the said orders to vacate and did not plant any fall wheat, plow or cultivate their lands or orchards, discharged their labor, and sold their farming implements and farm stock preparatory to moving from the island.

VI. Thereafter on the 14th day of December, 1917, the President of the United States issued a second proclamation (40 Stat. part 2, page 1731), whereby the President of the United States took over for the United States all that tract of land therein described for the purposes of establishing a proving ground thereafter known as the Aberdeen Proving

Ground, in Harford County, Maryland. This proclamation contained the following language:

"This proclamation supersedes the proclamation issued on the 16th day of October, 1917, authorizing the Secretary of War to take over the lands above described, together with other lands, which prior proclamation, in so far as it is inconsistent with this proclamation, is hereby revoked."

All persons residing on the lands taken over were notified in the proclamation to vacate the same by January 1, 1918, and all owners of the land and improvements taken over were notified to appear before a commission and present their claims for compensation.

The lands taken over by the President by the last said proclamation did not include the Middle Island Farm of plaintiffs on Spesutia Island, but did include the mainland terminal of the ferry and all of the land including the road described as aforesaid on the mainland, which was the main means of ingress and egress other than by water from the town of Havre de Grace to their said land and over which the plaintiffs owned an easement appurtenant to the said Middle Island Farm.

VII. Immediately subsequent to the date of the second proclamation of the President of the United States, the Government took over approximately thirty thousand acres of land, covered by said proclamation, and began the establishment of a proving ground thereon. The limits of the proving-ground reserve included the thirty-five acres of land on which was located the private road, the ferryhouse and other buildings heretofore mentioned, and a part of Spesutia Narrows. Immediately following the establishment of the proving ground on the land that was taken over by the Government, the buildings used by plaintiffs and other inhabitants of the island on the mainland were torn down and destroyed. Plaintiffs and the other owners were, and have been since said time, refused the right to maintain the ferry on the Government's lands, as theretofore maintained, and the Government also refused plaintiffs and the other inhabitants of the island, together with their employees and guests, the right to use without restriction that part of the

private road within the limits of the proving ground except at the will and by the permission of those in authority at the proving ground. Since the day and date that the Government took over the lands and established the proving ground thereon, all persons desiring to go to Spesutia Island are stopped at the limits of the proving ground by sentries, and if the noncommissioned officer in charge of the gate deems it proper the person is given a pass directing him to appear at the administration building within twenty minutes, where he is required to explain the purpose of his visit, and if such explanation is satisfactory to the officer in charge, he is given a pass, not as a matter of right, but at the will of the said officer in charge, to go to the island, but must report to the administration building for another pass before being allowed to leave the proving ground on his return from the island. All baggage, packages, bundles, merchandise, etc., are, by regulations promulgated by the commandant of the proving ground, required to be taken to the administration building, opened and inspected by the military authorities before a pass will be issued allowing anyone to take baggage, packages, bundles, or merchandise through or from the proving ground.

The Government has built and constructed roadways over and across the proving ground, some of which roadways are built of concrete and others of macadam. One of these roadways leads from near the administration building in the proving ground to the site of the ferry terminal. The Government will not permit heavy machinery of any kind to be taken over said roadways.

In the year 1918 the United States declared Spesutia Narrows and a part of Spesutia Island, including a large part of the plaintiffs' lands, a danger zone from gunfire and aerial bombs from the United States proving ground, and published a map showing the said danger zone in the newspapers of Baltimore City and Harford County, Maryland, and through the same means warned the public, including the plaintiffs, not to enter the said zone. When plaintiffs and other persons pass through the proving ground to the island they have to pass through an area on the mainland

declared to be a danger zone because of the flight of aeroplanes carrying bombs and other explosives.

The United States established and operates upon the lands taken over for the Aberdeen Proving Ground a testing station for guns, and established and maintains a flying field thereon for the training of aviators and the testing of aeroplanes and aerial bombs for war purposes, which training and testing include the carrying and dropping of bombs, flares, and other dangerous devices. Since the establishment of the proving ground, defendant's officers and enlisted men, operating aeroplanes, have at intervals operated aeroplanes carrying bombs and other explosives over plaintiff's farm and have repeatedly operated aeroplanes carrying such bombs and explosives over Spesutia Narrows. It does not appear from the testimony in the record just how frequently aeroplanes loaded with bombs have been operated over Spesutia Island. Such aeroplanes were operated over Spesutia Narrows almost daily.

Due to lack of access to Spesutia Island, it has been since the establishment of the proving ground an impossibility for plaintiffs to operate their farm in a profitable manner.

On account of aeroplanes loaded with bombs and other explosives flying over the narrows, and over the lands on Spesutia Island, and also on account of the fact that the inhabitants of the island have been denied the free right to go to and from the island through the Aberdeen Proving Ground, plaintiffs have been unable to keep necessary laborers on the farm to operate the same.

VIII. Immediately after the taking over of said lands for the proving ground the Government established a land commission and authorized said commission to hear evidence and award damages resulting from the taking of the lands under the President's proclamation aforesaid. In January, 1918, plaintiffs herein presented a claim to said land commission for damages sustained by them, resulting from plaintiffs' efforts to carry out the order to vacate that was given them under the first proclamation. Said claim was heard by the commission, sitting at Aberdeen, Maryland, late in the evening, and an agreement was reached by and between the

members of the commission and plaintiffs' attorney wherein the commission agreed to pay to plaintiffs the sum of $2,000.00 as full payment of all damages resulting from the sale of stock and the failure to plant crops in the fall, due to the order to vacate. At that time one of the plaintiffs, namely, Robert M. Vandiver, was handed a blank voucher by a member of the commission and told to have it executed by the other two plaintiffs and himself and when executed to return it to the commission. Pursuant to such agreement plaintiffs all three signed and executed the voucher in blank and returned it to the commission and later received the sum of $2,000.00.

Subsequent to that time and on January 22, 1919, and contrary to the intentions of the members of the commission and plaintiffs, and without plaintiffs' consent or knowledge, the voucher was filled in with the following words:

"JAN. 22, 1919.

"In full payment for all claims for damages resulting from the acquisition by the United States of the possession of and title to the right of way formerly enjoyed by us over the private roadway from the ferry opposite Spesutia Island on the mainland of Bush River Neck to a connection with the public road leading to Aberdeen, in Harford County, Maryland, pursuant to the urgent deficiency act of Congress approved Oct. 6, 1917 (Pub. No. 64, 65th Congress), and the proclamations of the President of the United States, bearing dates October 16, 1917, and December 14, 1917, and being all of the damages sustained by us by reason of the proclamations above mentioned, $2,000.00."

More than a year subsequent to the payment of the $2,000.00 plaintiffs presented a claim to the land commission for damages sustained because of the taking by the United States of the lands on the mainland which plaintiffs used for ingress and egress to their lands on the island. This claim was taken up and considered without objection by the full membership of the commission, and recommendation was made to the War Department by the members of the commission that the entire Spesutia Island be taken over by the United States. The land commission was abolished before any further action was taken by it on the claim.

IX. At and before the time that the Government took possession of the thirty-five acres of land on the mainland and the private right of way thereon, which plaintiffs and the other inhabitants of Spesutia Island used as a means of ingress and egress to their farms on Spesutia Island, the market value of plaintiffs' 350 acres of land, known and designated as the Middle Island Farm, was the sum of $76,000. Subsequent to the taking of the thirty-five acres of land on the mainland and the right of way thereon the market value of plaintiffs' lands on Spesutia Island was the sum of $35,000.

X. On the 20th day of April, 1927, which date was subsequent to the filing of the cause of action in this court, plaintiffs, Annie C. Vandiver, Dorothy C. Vandiver, and Robert M. Vandiver, together with his wife Kathryn M. Vandiver, conveyed by warranty deed all of their lands, known as the Middle Island Farm on Spesutia Island, the same being the lands involved in this action, to the Spesutia Island Development Company, a corporation duly organized under the laws of the State of Delaware, which corporation is now, and has been since the 20th day of April, 1927, the owner of the fee simple title in and to said lands. The consideration named in said deed of conveyance was the sum of $10.00 and other good and valuable considerations. The actual consideration that passed between the grantee and the grantors in said conveyance was the sum of $70,000, which included the value of certain personal property consisting of farming tools, livestock, and other farm products, which personal property was sold by plaintiffs to the Spesutia Island Development Company, and the value of which personal property was about $5,000. Subsequent to the taking of the thirty-five acres of land by the Government, plaintiffs had improved the farm by building thereon a bungalow at a cost of $10,000. The actual consideration for the sale of the lands to the Spesutia Island Development Company was approximately $50,000. The stock in the corporation known as the Spesutia Island Development Company was, and is owned and controlled by certain clubmen and sportsmen in

New York City and elsewhere, and they bought said land to use it as a game preserve and shooting ground in connection with the Upper Island Farm on Spesutia Island, which farm was at said time, is now, and has been for many years prior to December, 1918, owned and controlled by the same stockholders. The fact that Spesutia Island was more isolated subsequent to the taking of the lands on the mainland by the Government made the lands of plaintiffs more valuable for a game preserve than they were previous to the taking of said lands by the Government. The value of all lands about the headwaters of Chesapeake Bay, similar to plaintiffs' lands on Spesutia Island, and suitable for gunning and hunting purposes had greatly increased in value in the period from 1917 to 1927.

The court decided that plaintiffs were entitled to recover $41,000.00 with interest from December 14, 1917.

GREEN, *Judge*, delivered the opinion of the court:

This case involves no new principles and turns entirely upon the facts shown in the findings.

The plaintiffs owned 350 acres of land on Spesutia Island, in Chesapeake Bay, valuable for farming and other purposes. The principal method of ingress and egress to and from this farm was over an easement or right of way upon and through about 35 acres of land on the mainland, which permitted a passage to and from a ferry leading to the island, to which easement and right of way the plaintiffs had title as appurtenant to their 350-acre farm. The Government took over about 30,000 acres on the mainland, including the 35 acres upon which said right of way was located. This land was taken over and used by the Government as a proving ground, and since the establishment of the proving ground the defendant's officers and enlisted men have at intervals operated aeroplanes carrying bombs and other explosives over plaintiffs' farm, a part of which was declared to be in a danger zone. The defendant also refused the plaintiffs the right of operating a ferry from their prop-

Opinion of the Court

erty to the island, which had theretofore been maintained, and restricted ingress and egress to and from plaintiffs' lands over the said 35-acre tract in such a manner as to make it impossible for plaintiffs to operate their farm in a profitable manner. The evidence shows that prior to the establishment of the Government proving ground and the acts of the defendant as aforesaid, the market value of plaintiffs' 350 acres of land was $76,000. Thereafter, it was worth only $35,000.

The defendant objects to this finding, principally upon the ground that there was testimony to the effect that in April, 1927, more than nine years after the Government had established the proving ground, plaintiffs sold their farm for $70,000, but this testimony is inadmissible to establish the value of the land, both on account of the time of the sale being so remote and it further appearing from the testimony that the value of all lands about the headwaters of Chesapeake Bay, similar to plaintiffs' lands and suitable for gunning and hunting purposes, as plaintiffs' land was, had very greatly increased in the period which had elapsed.

Defendant also presents a plea that the plaintiffs' claim has been settled, based upon a voucher signed by plaintiffs. The evidence shows that after this voucher had been signed, the language upon which defendant relies was wrongfully written in a blank space therein, contrary to the understanding of the parties and without plaintiffs' knowledge or consent. As the rights of no innocent parties are involved, the plaintiffs are not bound thereby.

It follows that plaintiffs are entitled to recover the difference between the value of their land before and after the Government had established the proving ground, together with six per cent interest thereon from December 14, 1917, the time when plaintiffs' property was taken, until paid.

It is ordered that judgment be entered accordingly.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

HARRISBURG PIPE & PIPE BENDING CO. v. THE UNITED STATES

[No. E-289. Decided March 11, 1929]

On the Proofs

Cancellation of contract; act of June 15, 1917; just compensation.—Plaintiff's contract with the Government, entered into September 19, 1918, having been canceled under the act of June 15, 1917, it is entitled to recover the actual expenditures necessary to perform the contract, less the market value at the time of cancellation of material retained, together with interest on the amount of recovery from date of cancellation until paid.

The Reporter's statement of the case:

Mr. Harold J. Pack for the plaintiff.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is now, and was at all of the times hereinafter mentioned, a corporation duly organized and existing under the laws of the State of Pennsylvania, with its principal office and place of business at Harrisburg in said State of Pennsylvania.

II. At the time the contract hereinafter referred to was executed, and for a long time prior thereto, plaintiff owned a plant covering a site area of approximately fifty-one acres of ground, which plant consisted of buildings, steel furnaces, equipment, facilities, and paraphernalia of the kind and in sufficient quantity necessary for the manufacture of projectiles.

During the year 1917 plaintiff corporation was engaged in the performance of a contract with the United States Government for the manufacture of 560,000 4″ projectiles. On October 15, 1917, said contract was amended by adding 900,000 projectiles thereto, making 1,460,000 projectiles to be manufactured under the contract. Plaintiff's plant was the only one in the country which could successfully make 4″ projectiles and was depended upon by defendant to supply

Reporter's Statement of the Case

this shell. About July 1, 1918, the officers of plaintiff corporation received information, through Government inspectors at their plant, which justified them in believing that another order would be given plaintiff for 800,000 4″ projectiles, either by way of amendment to the existing contract or by a new contract, and plaintiff was urged by the inspectors to keep itself supplied with materials for the successful delivery of said projectiles.

On July 25, 1918, the Bureau of Ordnance, Navy Department, requested plaintiff to submit a proposal for the manufacture of said additional 800,000 projectiles, and plaintiff replied to said request by letter dated July 30, 1918, as follows:

33408/257-(H2)-O
WTB

JULY 30, 1918.

Subject: Additional 4″ projectiles.

BUREAU OF ORDNANCE,
Navy Department, Washington, D. C.

GENTLEMEN: Replying to your letter of July 25, 1918, on the subject of additional 4″ L. P. common projectiles similar to those being furnished on contract 647, we beg to reply as follows:

We would propose to furnish up to but not exceeding 800,000 of these projectiles for delivery at approximately the present rate and to continue until June 30, 1919; first deliveries to be made in December, 1918, following completion of present contract.

We desire the bureau to furnish 103% copper rotating bands delivered at our plant, Harrisburg, Pa., as provided for in the present contact.

Owing to the readjustment of all wages and the universal increase in labor costs, we find it impossible to furnish these projectiles at the present price of $7.67 each.

We have already granted increases of wages on our present contracts approximating 60¢ per shell, but hope by other economies of production to reduce this increased cost one-half.

We are willing, therefore, to undertake not to exceed 800,000 of these projectiles at $7.97 each, subject to all other terms and conditions of the present contract.

Respectfully,

HARRISBURG PIPE & PIPE BENDING CO.,
——— ———, *General Manager.*

Reporter's Statement of the Case

Under date of August 24, 1918, the Bureau of Ordnance sent plaintiff the following letter:

33408–(H2)–O
WTB

WASHINGTON, D. C., *August 24, 1918.*

Subject: 4″ common projectiles.

SIRS: The Navy Department has decided that the 800,000 4″ common projectiles on which the company recently submitted a quotation shall be purchased after competitive bidding. Bids for these projectiles will be opened September 11, 1918, and the necessary papers for bidding will be furnished the company.

Very truly yours,

RALPH EARLE,
Chief of Bureau.

HARRISBURG PIPE & PIPE BENDING CO.,
Harrisburg, Pa.

Plaintiff replied to said letter stating that it was in position to bid on the projectiles and would be pleased to receive the necessary proposal blanks at the convenience of the department. Under date of September 10, 1918, plaintiff submitted its bid to manufacture said 800,000 projectiles, and on the 17th day of September, 1918, plaintiff was notified by letter signed by the Secretary of the Navy that its bid had been accepted and that drafts of contract and bond covering the work would be sent at an early date.

A formal contract, dated September 19, 1918, was entered into by and between the plaintiff and the Government of the United States, represented by Franklin D. Roosevelt, Acting Secretary of the Navy, by the terms of which plaintiff corporation agreed, at its own risk and expense, to manufacture and deliver to the Navy Department, in conformity with and subject to the conditions stated in specifications attached to and made a part of the contract, 800,000 4″ common projectiles at $7.97 each, for a total of $6,376,000. Said projectiles were to be delivered as follows:

One lot of 1,000 projectiles on or before December 28, 1918.

133,000 additional projectiles each month thereafter until completion.

A copy of said contract is attached to plaintiff's petition as "Exhibit A," and is made a part of this finding by reference.

Reporter's Statement of the Case

A copy of this contract was given to plaintiff's Washington representative and a copy mailed to plaintiff. The record does not show the date that said copy was furnished to the Washington representative, and the copy mailed to the plaintiff was received by plaintiff about November 14, 1918.

III. After receiving the information from the Government inspectors about the forthcoming order for projectiles, referred to in Finding II, and on August 14, 1918, plaintiff placed an order with Crocker Brothers, of New York City, for 500 tons of standard domestic ferromanganese, at the price of $250 per gross ton based on 70 units of manganese f. o. b. furnaces, freight allowed, to plaintiff's plant, with a scale of $3.50 per unit in excess of 70 units, shipments to be made in equal monthly installments during the first half of the year 1919. Said 500 tons of manganese were delivered to plaintiff and were the approximate amount required to manufacture the steel necessary for the production of 800,000 projectiles. The contract price of said manganese was $137,820.35, which was paid by plaintiff.

IV. After being notified by the Secretary of the Navy that its bid had been accepted, as set forth in Finding II, and on October 29, 1918, plaintiff placed an order with Rogers, Brown & Company, of Philadelphia, for 9,000 gross tons of "Empire" chill cast basic pig iron at the price authorized by the Government, said price being $33.30 per ton f. o. b. furnace, deliveries to be made in equal monthly shipments over the first six months of 1919. Said 9,000 tons of pig iron were required for the manufacture of the 800,000 projectiles covered by said contract. Said pig iron was delivered to plaintiff and plaintiff paid therefor the sum of $299,700. Plaintiff also paid the freight thereon amounting to $16,200, making the cost of the pig iron $315,900.

On October 30, 1918, a further order for 9,000 gross tons of pig iron was placed by plaintiff with the Eastern Steel Company of Pottstown, Pa., at the Government price, same being $33.80 per ton, f. o. b. furnace, shipments to be made in equal monthly installments from January to June of 1919. Said pig iron was necessary for the performance of the contract and was delivered to the plaintiff, for which

plaintiff paid the sum of $304,200, and paid freight thereon amounting to $11,700, or a total sum of $315,900.

V. After plaintiff received the information about the forthcoming order for projectiles referred to in Finding II, it gave orders for tool steel of various sizes at the price of $2 per pound. A large part of this tool steel was ordered subsequent to the time the contract was entered into, but a small part thereof was ordered before said contract was entered into, and subsequent to the time plaintiff received the information about the forthcoming order for projectiles. The total contract price of the tool steel ordered and paid for by plaintiff for the performance of the contract was $33,399.24.

On April 26, 1919, the difference between the market value and the contract price for the tool steel was $20,094.44.

VI. Between the 1st day of August, 1918, and the 15th day of November, 1918, plaintiff expended for labor in the manufacture of tools required to be used in the production of projectiles the sum of $79,868.91. During said time plaintiff corporation was engaged exclusively in the manufacture of projectiles for the Government of the United States. Seventy-five per cent of the amount so expended was applicable to the contract dated September 19, 1918, the same being the contract involved in this action. Said tools were not of any value in commercial work and subsequent to the cancellation of the contract said tools had no value except as scrap tool steel. It does not appear from the evidence what value, if any, said tools had as scrap.

From the 1st day of July, 1918, to the 16th day of November, 1918, plaintiff bought and paid for supplies consisting of castings, grinding wheels, drills, checks, and hobbs, for which plaintiff paid the sum of $35,923 22. Seventy-five per cent of said amount, or $26,942.17, was expended for supplies applicable to the contract in this case. Subsequent to the cancellation of the contract the salvage value of said supplies was $6,735.54. The difference between the cost and the salvage value was $20,206.63.

On the 7th day of August, 1918, plaintiff placed an order with the Aldrich Pump Company, of Allentown, Pa., for the construction of one 4½×12 Aldrich Vertical Triplex Elec-

tric Pump at a cost of $10,000. Said pump was to be used by plaintiff in the manufacture of the 800,000 projectiles covered by the contract. The pump was not delivered, and subsequent to the cancellation of the contract plaintiff paid the Aldrich Pump Company the sum of $1,533.98, and the pump contract with the Aldrich Pump Company was canceled.

VII. On November 16, 1918, the Chief of the Bureau of Ordnance, Navy Department, sent plaintiff the following telegram:

"Bureau understands no work has been undertaken on contract two naught six seven for eight hundred thousand four-inch common projectiles. In view of this it is believed that no hardship will be entailed by the manufacturer if complete cancellation of this contract is effected. Steps will be taken through the proper governmental agency for cancellation. You are requested to govern yourself accordingly and endeavor to replace this with commercial business."

Upon the receipt of said telegram plaintiff discontinued preparations for the manufacture of said projectiles, and incurred no further liabilities on account of said contract. Plaintiff entered into negotiations with the Navy Department with a view to obtaining permission to proceed with the manufacture of a part of the projectiles covered by the contract. These negotiations continued until February 19, 1919, when the Secretary of the Navy wrote plaintiff as follows:

FEBRUARY 19, 1919.

HARRISBURG PIPE & PIPE BENDING CO.,
Harrisburg, Pa.

GENTLEMEN: The Bureau of Ordnance has submitted a recommendation to the department that the contract entered into with you under date of September 19, 1918, for 800,000 4-inch common projectiles be canceled in view of the fact that due to the cessation of hostilities the number of shell of this caliber called for by this contract will not be required.

In order that full information may be before the department in taking action upon the foregoing recommendation, advice is requested as to whether you have expended any money in connection with the prosecution of this contract or incurred financial responsibility properly chargeable

thereto, in which event please submit a detailed statement of such expenses, giving the nature thereof, the amount involved, and the purpose for which such expense was incurred.

Very respectfully,

(Signed) JOSEPHUS DANIELS,
Secretary.

Under date of April 26, 1919, Franklin D. Roosevelt, Acting Secretary of the Navy, wrote plaintiff notifying it that said contract was canceled in its entirety. Said letter was as follows:

APRIL 26, 1919.

HARRISBURG PIPE & PIPE BENDING CO.,
Harrisburg, Pa.

GENTLEMEN: Referring to previous correspondence between you, the department and the Bureau of Ordnance requesting you to suspend all work under department contract #2067 of September 19, 1918, for 800,000 4-inch common projectiles, you are hereby formally notified that said contract is canceled in its entirety.

As you were heretofore advised the department is willing to reimburse you for such expenditures, if any, as have been incurred by you under the contract in question, and you have been requested several times to submit your claim therefor. To date no evidence of this character has been furnished, and it is the understanding of the department that no obligations have been entered into chargeable to this contract. If, however, this understanding is not correct the department will give due consideration to any claims of this nature you care to submit.

Please acknowledge receipt of this communication.

Very respectfully,

(Signed) FRANKLIN D. ROOSEVELT,
Acting Secretary.

Under date of April 30, 1919, plaintiff replied to said letter as follows:

APRIL 30, 1919.

The Honorable FRANKLIN D. ROOSEVELT,
Acting Secretary of the Navy, Washington, D. C.

DEAR SIR: We beg to acknowledge receipt of communication of the 26th inst., No. 26548-454: 9, with regard to the cancellation of department contract No. 2067, of September 19, 1918, for 800,000 4″ common projectiles.

In reply we beg to call attention to the fact that the department's understanding that no obligations have been entered into by us chargeable to said contract, is erroneous.

On the contrary, we did enter into such obligations; but we have declined to submit a statement thereof because mere reimbursement for such expenditures would not compensate us for the loss which the department imposed upon us by canceling the contract.

Our understanding is that mere reimbursement for expenses actually incurred for obligations assumed by us in connection with the contract is all that the department would be willing to allow in consideration of our consenting to the cancellation of the contract. As we have previously advised the department, such a settlement would not be satisfactory to us.

In this connection we call attention to our letter to the department of the 23d inst., of which we enclose a copy.

Yours very truly,

HARRISBURG PIPE & PIPE BENDING CO.
——— ———, *General Manager.*

WTH.

The following is a copy of the "letter to the department of the 23d inst.," referred to in the above letter of April 30, 1919:

APRIL 23, 1919.

Refer to No. 664.

BUREAU OF ORDNANCE,
Navy Department, Washington, D. C.

Via: N. I. O., Midvale Steel Co., Philadelphia, Pa.

Subject: Contract of September 19, 1918, for 800,000 4-inch common projectiles.

GENTLEMEN: We have been requested by representatives of the Bureau of Ordnance to submit a statement of expenses incurred on account of the contract of September 19, 1918, for 800,000 4″ common projectiles, and of the demand made on us by the Aldrich Pump Company for reimbursement on account of the cancellation of our order placed with them for a pump which we needed in connection with the contract for these projectiles.

We believe that the requests are based on a misunderstanding, inasmuch as we have notified the Navy Department that we would not consent to the cancellation of the contract and that we intend to assert our claims in the courts.

We understand that the information requested by the Bureau's representatives is desired only in cases where the contractors have consented to the cancellation of the contracts and a settlement is being made on the basis of reim-

bursement for actual expenses. As we have already advised the department, our actual outlays are not large when compared with the loss sustained by us in not being permitted to complete the contract.

We shall, of course, endeavor to reduce to the lowest minimum possible the amounts which we are obliged to pay on account of obligations which we incurred in connection with the carrying out of our contract for the shells. We tried to secure a cancellation of the order placed with the Aldrich Pump Company and they consented, provided we paid a cancellation charge of $4,378.11. If the Navy Department can induce them to reduce that amount, or to release us entirely we will be very glad to cooperate with the department in that direction.

We obligated ourselves to purchase 18,000 tons of pig iron for delivery during the first six months of the present year for use in connection with our contract for shells. At that time the market price was $35.10 per ton f. o. b. our works. We have tried to secure a release from that contract, but the producers have refused to release us. We will sustain a very large loss on that account, as the price of pig iron to-day is $27.55. If the Navy Department can assist us in securing a cancellation of that contract we will be glad to cooperate toward that end.

As stated above we are doing the best we can toward reducing our losses so as to reduce the amount of our damages.

If it is the desire of the department to cooperate with us in that direction, we will gladly avail ourselves of its assistance; but it is not our intention to abandon our claim for such damages as we may be legally entitled to by reason of the department's cancellation of the contract.

Very sincerely,

HARRISBURG PIPE & PIPE BENDING CO.
——— ———, *General Manager.*

WTH.
r.

VIII. On April 26, 1919, the reasonable market value of manganese purchased for use in the manufacture of the 800,000 projectiles, which became the subject of the contract and was covered thereby, was $110 per ton. At said time the difference between the contract cost price of the manganese and the market value was $70,000.

On April 26, 1919, the market value of the pig iron purchased for said contract was $29.65 per gross ton. The difference between the market value and the contract price

for the 18,000 tons of pig iron purchased by plaintiff for the performance of the contract was $98,100.

The sum of $23,350 is a reasonable cost for handling charges of the pig iron and manganese purchased for the performance of the contract.

IX. On November 16, 1918, the same being the time the telegram set out in Finding VII hereof was sent to plaintiff, there was no market for the pig iron and manganese that plaintiff had bought and had on hand for the manufacture of the 800,000 projectiles. The trade journals carried quotations for pig iron and manganese, but immediately following the signing of the armistice all Government contractors had supplies of pig iron and manganese on hand, and as there was no sale for the same no market value was established.

X. Plaintiff consumed the manganese and pig iron referred to in Findings III and IV, and also the other supplies referred to in the second paragraph of Finding VI, in connection with plaintiff's operations during the year 1919 and thereafter. It does not appear from the evidence that defendant made any effort to take over said material.

XI. Plaintiff has not been paid any sum whatever for any loss sustained by reason of the cancellation of the contract.

XII. If said contract had not been canceled and plaintiff had been permitted to perform the same in its entirety, it would have made a profit of $1,750,000.

The court decided that plaintiff was entitled to recover $269,836.74 with interest from April 26, 1919.

SINNOTT, *Judge*, delivered the opinion of the court:

Plaintiff herein seeks to recover the actual losses sustained by it, growing out of the cancellation of a contract, under the authority of an act of Congress approved June 15, 1917, 40 Stat. 182. The contract in question, bearing the number 2067, was entered into by plaintiff and defendant, through Josephus Daniels, Secretary of the Navy, and bore date the 19th day of September, 1918, and called for the manufacture of 800,000 4″ projectiles, at the price of $7.97

each, 1,000 to be delivered on or before December 28, 1918, and 133,000 each month thereafter until completion.

At the time said contract was entered into plaintiff was engaged in the manufacture of 4″ projectiles for the Navy under another contract calling for the manufacture of 560,-000 projectiles, which contract was amended on October 15, 1917, by increasing the number of projectiles to be manufactured by 900,000.

Plaintiff's uncontradicted testimony was that its plant was the only one in the country which could successfully make 4″ projectiles, and that it was depended upon by defendant to supply this projectile.

About July 1, 1918, the officers of plaintiff received information through the Government inspectors at plaintiff's plant which justified them in believing that another order would be given plaintiff for 800,000 4″ projectiles, either by way of amendment to the existing contract or by a new contract. At the same time plaintiff was urged by the inspectors to keep itself supplied with materials for the successful delivery of said projectiles.

On July 30, 1918, plaintiff answered a letter of July 25, 1918, from the Bureau of Ordnance, Navy Department, relative to the manufacture of said 800,000 projectiles, wherein plaintiff proposed to manufacture the same for $7.97 each. In reply to plaintiff's said letter the Bureau of Ordnance, Navy Department, informed plaintiff by letter of August 24, 1918, that the Navy Department had decided that said projectiles would be purchased after competitive bidding, and that bids would be opened September 11, 1918, whereupon plaintiff filed its bid, and on September 17, 1918, the Secretary of the Navy notified plaintiff, by letter, that its bid had been accepted, and that drafts of contract and bond would be sent to plaintiff at an early date. The contract herein involved, dated September 19, 1918, was thereafter executed by plaintiff and by defendant through the Secretary of the Navy.

After receiving the information from the Government inspectors which justified plaintiff in believing that it would receive an order for 800,000 projectiles, and after being urged by the inspectors to keep itself supplied with mate-

rials for the successful delivery of said shells, plaintiff proceeded to make purchases of some of the materials necessary for the manufacture of said shells, and also made such purchases promptly after the contract was awarded. On August 14, 1918, plaintiff placed an order for 500 tons of manganese. It was the approximate amount required in the manufacture of the 800,000 projectiles. The manganese was delivered to plaintiff. The contract price paid by plaintiff therefor was $137,820.35. On April 26, 1919, when the contract was canceled, the difference between the contract cost price of the manganese and the market value was $70,000.

On October 29, 1918, plaintiff placed an order for 9,000 gross tons of pig iron, and on October 30, 1918, a further order for 9,000 gross tons of pig iron. Said pig iron was necessary for the performance of the contract and was delivered to plaintiff, for which plaintiff paid the sum of $631,800. The difference between the market value when the contract was canceled and the contract price for the 18,000 tons of pig iron was $98,100.

Plaintiff also gave orders for tool steel of various sizes. A large part of this tool steel was ordered subsequent to the date of the contract, but a small part thereof was ordered before said contract was entered into but subsequent to the time plaintiff received the information about the forthcoming order for projectiles referred to in Finding II. On April 26, 1919, the date of the cancellation of the contract, the difference between the market value and the price plaintiff paid for the tool steel was $20,094.44. Between the 1st day of August, 1918, and the 15th day of November, 1918, plaintiff expended for labor in the manufacture of tools required to be used in the production of projectiles the sum of $79,868.91; 75 per cent of the amount so expended, or $59,901.69, was applicable to the contract herein involved. Said tools were not of any value in commercial work and subsequent to the cancellation of the contract had no value except as scrap tool steel. It does not appear from the evidence what value, if any, said tools had as scrap.

Between the 1st day of July, 1918, and the 16th day of November, 1918, plaintiff bought supplies consisting of castings, grinding wheels, drills, checks, and hobbs, for which

plaintiff paid the sum of $35,923.22; 75 per cent of this amount, or $26,942.17, was expended for supplies applicable to the contract in this case. On the cancellation of the contract the salvage value of said supplies was $6,735.54. The difference between the cost and the salvage value was $20,206.63.

On the 7th day of August, 1918, plaintiff placed an order for a pump at a cost of $10,000. Said pump was to be used by plaintiff in the manufacture of the 800,000 projectiles covered by the contract. The pump was not delivered, and subsequent to the cancellation of the contract plaintiff paid the sum of $1,533.98 to cancel the contract for said pump.

On November 16, 1918, the Chief of the Bureau of Ordnance, Navy Department, sent plaintiff the telegram referred to in Finding VII, notifying plaintiff that steps would be taken for the cancellation of the contract in question. Upon receipt of said telegram plaintiff discontinued all preparations for the manufacture of projectiles called for under said contract and incurred no further obligations on account of the same. By letter of April 26, 1919, referred to in Finding VII, Franklin D. Roosevelt, Acting Secretary of the Navy, notified plaintiff that the contract herein involved, number 2067, was canceled.

The amounts which we have allowed plaintiff are as follows:

On purchase of pig iron	$98,100.00	(Finding VIII)
On purchase of ferromanganese	70,000.00	(Finding VIII)
On purchase of tool steel	20,094.44	(Finding V)
Cost of labor on tools	59,901.69	(Finding VI)
On purchase of supplies	20,206.63	(Finding VI)
On purchase of pump	1,533.98	(Finding VI)
Total	269,836.74	

The above amounts allowed plaintiff are plaintiff's expenditures, which were necessary to perform the contract, less the market value of the pig iron, ferromanganese, and tool steel, kept by the plaintiff, and less the salvage value of supplies.

The case of *Barrett Company* v. *United States*, 273 U. S. 227, is authority for allowing plaintiff the amount above set forth. In this case the Supreme Court said:

"Just compensation for canceling the contract requires that the contractor shall be made whole and recover the expenditures necessary to perform the contract. It would have been no defense, had the company failed to perform and the Government had sued for a breach, that the plant erected upon the estimate was not sufficient to do what was agreed. That was the contractor's risk. * * *

"What the company is entitled to is just compensation for the contract which was taken from it, and under the cases just cited it should certainly be credited with the outlay which it can show there was reasonable ground for making in order to fulfill its engagements."

We have not allowed plaintiff the handling charges for the pig iron and manganese mentioned in Finding VIII, for the reason that plaintiff used this material in its other operations. Had plaintiff not kept this material, it would have had to purchase other pig iron and manganese and pay for the handling charges thereof.

Defendant contends that because plaintiff kept the pig iron, manganese, and other supplies, and consumed them in its operations on other contracts during the year 1919 and thereafter, there is no showing that plaintiff lost anything by reason of the purchase of these materials.

If we understand defendant's contention, it is that plaintiff may have made a profit in the use of the materials retained on its other contracts. In this contention defendant loses sight of the issue in this case, namely, just compensation to plaintiff for the cancellation of the contract in question under the act of June 15, 1917, 40 Stat. 182. Under this act, according to the decision in *Barrett Company* v. *United States*, *supra*, defendant is entitled "to be made whole and recover the expenditures necessary to perform the contract," and "should certainly be credited with the outlay which it can show there was reasonable ground for making in order to fulfill its engagements."

Under the ruling in the *Barrett case*, *supra*, had the defendant taken over the materials on hand when the con-

tract was canceled, which the evidence does not show it made any effort to do, it would have had to repay plaintiff for the expenditures made therefor, and the plaintiff would have had to purchase other similar materials to complete its other contracts. No one, in this event, would contend that defendant had any concern in the profit or loss of plaintiff on the materials used in these other contracts. The retention by plaintiff, and the use in its other operations, of certain materials purchased for the performance of the contract in question, and crediting defendant with the market value thereof as of the date of the cancellation of the contract is analogous to the purchase of said material referred to above, in which the defendant could have no concern in the profit or loss thereon.

Judgment should be awarded in favor of the plaintiff. It is so ordered.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

SHOTWELL MANUFACTURING CO. v. THE UNITED STATES [1]

[No. F-156. Decided March 11, 1929]

On the Proofs

Excise tax; candy; pop-corn products.—See *Cracker Jack Co.* v. *United States, ante*, p. 89.
Same; Treasury regulations.—Id.
Same; burden of proof.—Id.
Same; tax on luxuries.—Id.
Statutory construction; doubt as to meaning of a word.—Id.

The Reporter's statement of the case:

Mr. Jacob Mertens, jr., for the plaintiff. *Messrs. George E. Holmes* and *Valentine B. Havens*, and *Holmes, Paul & Havens* were on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

[1] Certiorari denied.

The court made special findings of fact, as follows:

I. At all the times herein referred to the plaintiff was and still is a corporation existing under the laws of the State of Illinois.

II. The plaintiff was engaged in the manufacture and sale of pop-corn products in the city of Chicago, Ill., and in Brooklyn, N. Y., at all the times referred to herein. Reference is hereinafter made to the "Chicago Branch" and the "Brooklyn Branch" of the plaintiff in referring to sales made in Chicago, Ill., and Brooklyn, N. Y., respectively, and payments of tax thereon.

III. The said pop-corn products manufactured and sold by plaintiff were Checkers (a pop-corn product corresponding to Cracker Jack), old-fashioned sugared pop corn, pop-corn balls, and pop-corn bricks.

IV. Said pop-corn products manufactured and sold by the plaintiff consisted of pop corn with a thin coating of syrup. This syrup, in the case of Checkers, was composed of corn syrup, raw sugar, and molasses, and in the case of old-fashioned sugared pop corn, pop-corn bricks, and pop-corn balls was composed of corn syrup and raw sugar.

V. The process through which the Checkers pass is as follows: The pop corn, after being gathered from the field, is cured, shelled, and screened. At the manufacturing plant the corn is conveyed to the popping ovens where it is preheated, popped, and again screened to remove the kernels which did not pop or which popped insufficiently to be salable. The popped corn is then conveyed to the mixing vats where a coating consisting of a syrup made of raw sugar, corn syrup, and molasses is poured on. The product is then cooled by rotation in an agitating machine. In Checkers the popped corn is then conveyed to the filling devices where it is mixed with a very small quantity of peanuts and then put into air and moisture tight packages. The pop-corn balls and pop-corn bricks instead of being put into boxes are pressed into the forms of balls and bricks, respectively.

The old-fashioned sugared pop corn is filled into bags instead of boxes.

By weight the finished checkers were 38.43% pop corn, 6.15% peanuts, 17.08% sugar, 8.28% molasses, and 30.06% corn syrup; the finished pop-corn brick was 61.63% pop corn, 17.20% sugar, 13.26% corn syrup, and 7.99% molasses; the finished pop-corn balls were 68.83% pop corn, 15.30% sugar, and 15.87% corn syrup; and the finished old-fashioned sugared pop corn was 69.73% pop corn, and 30.27% sugar.

VI. The plaintiff paid Federal excise taxes on these pop-corn products to the Commissioner of Internal Revenue for the period from February 25, 1919, to July 2, 1924, in accordance with the requirements of the regulations issued by the Commissioner of Internal Revenue.

VII. During the period from 1918 to 1924, inclusive, the leading manufacturers of pop corn and pop-corn confectionery in the United States were Rueckheim Bros. & Eckstein (the Cracker Jack Co.), Shotwell Manufacturing Co. (the plaintiff herein), and D. L. Clark & Co. These three companies manufactured and sold during this period over 90% of the pop corn and pop-corn confectionery manufactured.

VIII. Following the enactment of the revenue act of 1918, February 24, 1919, the Commissioner of Internal Revenue commenced the formulation of regulations interpreting the excise-tax provisions of that act. After several informal conferences a formal hearing was held with representatives of the National Confectioners' Association, of which plaintiff was a member and which included approximately four-fifths of the candy manufacturers in the United States, at which the commissioner was represented by Mr. John E. Walker, Deputy Commissioner of Internal Revenue, who as clerk of the House Ways and Means Committee was in a general way familiar with the proceedings before that committee on the same subject matter, by the Solicitor of Internal Revenue, and by a lawyer in the office of the Solicitor of Internal Revenue. At this hearing the National Confectioners' Association suggested a definition of candy, and the regulations for the enforcement of the statute, hereinafter recited, were in substantial conformity with the definition suggested.

IX. Regulations 47 interpreting the excise-tax provisions of the revenue act of 1918 were approved May 1, 1919, and were effective as of February 25, 1919.

X. Article 22 of Regulations 47 (approved May 1, 1919), reads, in part, as follows:

"Candy within the meaning of the act includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glacé or candied fruits and nuts, pop corn and other cereals or cereal products mixed with or covered with molasses, sugar, or other sweetening agent, hard candies, plain and chocolate-covered marshmallows, candy cough drops and sweetened licorice not taxed as cough drops, sweet chocolate and sweet milk chocolate whether plain or mixed with fruits or nuts; and all similar articles however designated. It does not include, however, cereal breakfast foods, cake and pastries, nor bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste. If a manufacturer of glacé or candied fruits at the time the goods are shipped or sold (whichever is prior) has in his possession an order or contract of sale with certificate of the purchaser printed thereon or in writing and permanently attached thereto, showing that such fruits so purchased are to be used in the manufacture of food products, such as ice cream, cakes, and pastries, the sale thereof shall not be taxable. Where a manufacturer of candy sells in connection with the sale of his own product candy which he has bought from another manufacturer and on which he has performed no further process of manufacture the tax attaches only to such portion of the goods sold as have been manufactured by him."

XI. Article 22 of Regulations 47, revised (approved December 27, 1920), reads, in part, as follows:

"Candy within the meaning of this subdivision—

"(a) Includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glacé or candied fruits and nuts not specified in paragraph (b) of this subdivision; pop corn and other cereals or cereal products, not specified in paragraph (b) of this subdivision, mixed with or covered with molasses, sugar, or other sweetening agent; hard candies; plain and

chocolate covered marshmallows; candy cough drops sold in bulk and without remedial claims (see art. 16, Regulations 51); sweetened licorice not taxed as cough drops under section 907; sweet chocolate and sweet milk chocolate whether plain or mixed with fruits or nuts, not specified in paragraph (b) of this subdivision; maple sugar mixed with fruits, nuts, etc., not specified in paragraph (b) of this subdivision; and all similar articles however designated; but

"(b) Does not include cereal breakfast foods, cake and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste, powdered chocolate, maple sugar or sirup not mixed with nuts, etc., marshmallow paste, glacé or candied fruit peel and citron, or sweet chocolate, glacé or candied fruits and nuts sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing, or from other facts in connection with the sale that it will not be consumed in the form in which it is then sold.

"Where a manufacturer sells candy which is packed or put up for sale in a fancy or plain box or container the tax is computed upon the selling price of the candy and container, whether the container is billed separately or not. However, where candy is purchased and the purchaser selects a fancy box or container in which the candy is placed the tax attaches to the selling price of the candy and not to the cost of the box. In such cases, if the sale is billed, the container and candy must be billed as separate items."

XII. Article 19 of Regulations 47 revised (approved January 6, 1922) is substantially identical with the provisions of Article 22 of Regulations 47 revised (approved December 27, 1920).

XIII. The pop-corn products of this company come within the terms pop corn and pop-corn confectionery.

XIV. Beginning with the month of February, 1919, and monthly thereafter until the month of November, 1923, plaintiff filed with the collector of internal revenue for the first district of New York, on the forms provided by the Commissioner of Internal Revenue for that purpose, returns for each of the months from February 25, 1919, to October, 1923, both inclusive, showing the amount of sales of Checkers, pop-corn balls, pop-corn bricks, and old-fashioned sugared pop corn for each of said months, respectively,

made by its Brooklyn branch and computed a tax thereon at the rates then in force for excise tax on the sale of candy.

The tax so computed under each of said returns was paid by plaintiff to said collector of internal revenue and by said collector turned over to the United States which still retains the same.

XV. Beginning with the month of February 25, 1919, and monthly thereafter to November, 1923, plaintiff filed with the collector of internal revenue for the first district of Illinois, on the forms provided by the Commissioner of Internal Revenue for that purpose, returns for each of the months from February, 1919, to October, 1923, both inclusive, showing the amount of sales of Checkers, pop-corn balls, pop-corn bricks, and old-fashioned sugared pop corn for each of said months, respectively, made by its Chicago branch, and computed a tax thereon at the rates then in force for excise tax on the sale of candy.

Beginning with the month of November, 1923, and monthly thereafter until July, 1924, plaintiff filed with the collector of internal revenue for the first district of Illinois on the forms provided by the Commissioner of Internal Revenue for that purpose, returns for each of the months from November, 1923, to July 2, 1924, both inclusive, showing the amount of sales of Checkers, pop-corn balls, pop-corn bricks, and old-fashioned sugared pop corn for each of said months, respectively, made by both its Chicago and Brooklyn branches, and computed a tax thereon at the rates then in force for excise tax on the sale of candy.

The tax so computed under each of said returns was paid by plaintiff to the collector of internal revenue for the first district of Illinois, and by said collector turned over to the United States which still retains the same.

XVI. The amount of the taxes so paid under the returns above referred to, together with the respective dates of payment and the particular month for the sales of which the taxes were paid, are set forth in a statement annexed to the petition marked "Exhibit A," which exhibit is incorporated herein by reference.

XVII. On or about November 28, 1923, plaintiff filed with the collector of internal revenue, first district, New York, a written claim that the excise taxes on certain of its pop-corn products, Checkers, old-fashioned sugared pop corn, pop-corn balls, and pop-corn bricks, paid previously thereto were improperly and erroneously collected, which said claim was thereafter amended and supplemented by the claims referred to in the next two succeeding findings.

XVIII. On December 31, 1923, plaintiff filed with the collector of internal revenue, first district, New York, a claim for the refund of $17,000 covering payments made from April 30, 1919, to July 24, 1920, for the period from February 25, 1919, to June 30, 1920, both inclusive.

XIX. On August 22, 1924, plaintiff filed with the collector of internal revenue, first district, New York, a statement supplementing said claims filed November 28, 1923, and December 31, 1923, and reducing the amount thereof from $17,000 to $9,485.21; which reduction was made for the purpose of excluding taxes paid from April 30, 1919, to October 30, 1919, both inclusive, the recovery of which amounts was regarded as barred by the statute of limitations.

XX. On or about August 22, 1924, plaintiff filed with the collector of internal revenue, first district, New York, a claim for refund in the amount of $22,369.66, covering payments made from August 30, 1920, to November 28, 1923, for the period from July 1, 1920, to October 31, 1923, both inclusive.

XXI. On or about November 30, 1923, plaintiff filed with the collector of internal revenue, first district, Illinois, a written claim that the excise taxes on certain of its pop-corn products paid previously thereto were improperly and erroneusly collected, which said claim was thereafter amended and supplemented by the claims referred to in the next two succeeding findings.

XXII. On December 31, 1923, plaintiff filed with the collector of internal revenue, first district, Illinois, a claim for refund of $72,000 covering payments made from May 29, 1919, to July 31, 1920, for the period from February 25, 1919, to June 30, 1920, both inclusive.

Opinion of the Court

XXIII. On August 22, 1924, plaintiff filed with the collector of internal revenue, first district, Illinois, a statement supplementing the said claims filed November 30, 1923, and December 31, 1923, and reducing the amount sought to be recovered from $72,000 to $36,749.79; which reduction was made for the purpose of excluding taxes paid from May 29, 1919, to October 31, 1919, both inclusive, recovery of which amounts was regarded as barred by the statute of limitations.

XXIV. On or about August 22, 1924, plaintiff filed with the collector of internal revenue, first district, Illinois, a claim for refund in the amount of $150,719.73, covering payments made from August 30, 1920, to July 31, 1924, for the period from July 1, 1920, to July 2, 1924, both inclusive.

XXV. All of said refund claims were based upon the alleged erroneous classification and taxation by the Commissioner of Internal Revenue of the pop-corn cereal products of the plaintiff as candy.

XXVI. Said refund claims were rejected by the Commissioner of Internal Revenue on or about the following dates, such rejections appearing on the schedules indicated:

Amount of claim	Schedule No.	District filed	Date schedule forwarded to collector
$17,000.00	1301	First Dist. New York	Feb. 27, 1926
$22,369.66 (reduced to $9,485.21)	1178	First Dist. New York	Nov. 28, 1925
$72,000.00 (reduced to $36,749.79)	1174	First Dist. Illinois	Nov. 28, 1925
$150,719.73	1174	First Dist. Illinois	Nov. 28, 1925

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This case was heard and submitted at the same time as the case of the *Cracker Jack Co.* v. *United States*, F–97, decided February 4, 1929 [*ante*, p. 89], both cases involving the same questions of law. This case is controlled by the principles announced in the decision in that case, and the petition should therefore be dismissed. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

SEABOARD AIR LINE RAILWAY CO. v. THE UNITED STATES

[No. E-438. Decided March 11, 1929]

On the Proofs

Income tax; old and new corporation; real estate acquired prior to March 1, 1913.—Upon its organization in 1915 a corporation took over all the assets and liabilities of another corporation, included in which, at the original purchase price, was certain real estate purchased prior to March 1, 1913. Thereafter the new corporation sold said real estate at an advance in price. *Held*, (1) that the profit realized was that of the new corporation, and (2) that the new corporation was not entitled to a valuation at the fair market price at the time it took over the property, but must pay its income tax on the profit represented by the difference between the price at which it acquired the property and the price at which the same was sold.

The Reporter's statement of the case:

Mr. James F. Wright for the plaintiff. *Mr. A. S. Holtz* was on the brief.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff corporation was organized in 1915 and did acquire, by a written agreement entered into October 11, 1915 (which agreement is filed as Exhibit A to the petition and made a part of this finding by reference), all the assets of the Seaboard Air Line Railway and the Carolina, Atlantic & Western Railway. The Seaboard Air Line Railway, plaintiff's predecessor corporation, purchased on various dates between 1896 and 1904, inclusive, five (5) parcels of real estate, for which it paid $42,645.14. All of the above real estate was acquired by the plaintiff company at its purchase price on the date of its organization. At various times during the year 1917 the plaintiff company sold such parcels of real estate for the total sum of $141,790 00.

In addition to the above, the parties have stipulated as follows:

(i) Plaintiff is and since October 11, 1915, has been a corporation engaged as a common carrier in the transportation of property and passengers in interstate commerce.

(ii) On March 30, 1918, plaintiff filed its railroad corporation and corporation excess-profits tax returns for the calendar year 1917, indicating a tax for said year of $26,687.14, which was duly paid.

(iii) On the 22d day of April, 1921, the Commissioner of Internal Revenue mailed a letter to the plaintiff, in which it was notified, as a result of an examination of its returns, that additional taxes in the sum of $6,026.78 were found to be due for said calendar year.

(iv) In June, 1921, the Commissioner of Internal Revenue assessed an additional tax against the plaintiff in the sum of $6,026.78 for said calendar year and scheduled the same to the collector.

(v) On July 1, 1921, plaintiff filed with the collector of internal revenue its claim for the refund of its 1917 tax in the sum of $1,287.70. Said claim for refund was allowed by a certificate of overassessment No. 207094.

(vi) On August 10, 1921, the collector of internal revenue sent notice of and made demand upon the plaintiff for the payment of said additional tax of $6,026.78.

(vii) On August 16, 1921, plaintiff filed a claim for abatement of said additional tax of $6,026.78.

(viii) A reaudit of plaintiff's returns in connection with plaintiff's claim for abatement with other information furnished disclosed an overassessment in tax in the sum of $4,898.61, as shown by a certificate of overassessment No. 217461.

(ix) As a result of the allowance of the certificates of overassessment plaintiff's tax account for the year 1917 was adjusted by the application of $1,287.70 as a credit, the tax to the extent of $4,739.08 was abated, and $159.53 was refunded to the plaintiff by the Government.

(x) Thereafter and on the 17th day of February, 1923, plaintiff filed a claim for the refund of its 1917 tax in the sum of $7,132.44.

(xi) On the 26th day of July, 1923, the Commissioner of Internal Revenue mailed a letter to the plaintiff in which plaintiff was notified that its claim for refund of $7,132.44 had been rejected.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The petition in this case alleges an illegal exaction of income taxes. The amount claimed is $5,260.00 and interest. The present plaintiff, the Seaboard Air Line Railway Company, is the successor in ownership and title of the entire assets of the Seaboard Air Line Railway and the Carolina, Atlantic & Western Railway. The proceedings which brought into existence the present plaintiff had their beginning in a written article of agreement dated October 11, 1915, and designated by the parties "Articles and Agreement of Merger and Consolidation between Seaboard Air Line Railway and Carolina, Atlantic & Western Railway forming Seaboard Air Line Railway Company." The specific purpose of the contract, without going into details, was the organization of the present plaintiff to take over, own, and operate the two railway companies theretofore operating under separate corporate entities. One of the plaintiff's predecessor corporations, i. e., the Seaboard Air Line Railway, had on various dates prior to October 11, 1915, acquired various parcels of realty for which it had paid $42,654.14. It is conceded that this asset of the company vested in the plaintiff under the foregoing contract. At various times during the year 1917 the plaintiff sold and conveyed the realty thus acquired for $141,790.00. The Commissioner of Internal Revenue in assessing plaintiff's income taxes for the year 1917 arrived at the amount due, $5,260.00, upon this item of income, upon the basis of the plaintiff having acquired the same subsequent to March 1, 1913. If the commissioner is within the statute in this respect, the amount of the tax, computed upon the basis of the difference between the cost of the realty and the sale price, is concededly cor-

rect. The plaintiff relies upon two distinct contentions for a recovery of the tax paid. First, it is argued that the contract of October 11, 1915, is by its terms and was intended to accomplish no more than a consolidation and merger of two noncompeting railway companies into a single corporation, i. e., the plaintiff, and for tax purposes the transfer to the plaintiff of the realty involved should have been treated by the commissioner as a mere incident to the consolidation of the two corporations; and that, inasmuch as the present plaintiff is for all practical purposes no more than a prolongation of the Seaboard Air Line Railway which had acquired the lands prior to March 1, 1913, the plaintiff is entitled to be treated as having acquired the same prior to March 1, 1913.

The court is asked to disregard facts, delve into the equities of the situation, and render a judgment predicated as plaintiff's counsel suggests upon "substance rather than form."

The revenue act of 1916 (39 Stat. 765) provides as follows:

"SEC. 10. That there shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation, * * * organized in the United States, no matter how created or organized * * * a tax of two per centum upon such income, * * *

"For the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition by a corporation * * * of property, real, personal, or mixed, acquired before March first, nineteen hundred and thirteen, the fair market price or value of such property as of March first, nineteen hundred and thirteen, shall be the basis for determining the amount of such gain derived or loss sustained."

The regulations of the commissioner promulgated under the act are as follows:

"Art. 101. *Income from sale of capital assets.*—If a corporation sells its capital assets in whole or in part, it will include in its gross income for the year in which the sale was made an amount equivalent to the excess of the sales price over the fair market price or value of such assets, as of March 1, 1913, if acquired prior to that date, or over cost if acquired subsequent to that date."

"Art. 116. *Sale of capital assets.*—Section 10 of this title provides that for the purpose of ascertaining the gain derived from the sale or other disposition of property, real, personal, or mixed, acquired prior to March 1, 1913, the fair market price or value of such property, as of that date, shall be the basis for determining the amount of such gain derived.

"This provision contemplates that all such gain realized and so ascertained, in cash or its equivalent, upon the sale or disposition of capital assets, shall be returned as gross income. In the case of property acquired subsequent to March 1, 1913, and later sold or disposed of, the difference between the cost and the selling price will be returned as income for the year in which the sale is made."

The plaintiff admits that the commissioner followed the letter of the law, and the facts, it seems to us, precluded any other course. It is difficult to perceive wherein jurisdiction vests in the court to apply a taxing statute to a corporation which ceased to exist nearly two years before the return for income taxes was due, and this is precisely what the court would have to do if it acceded to plaintiff's contentions. The record does not reflect a reorganization or a refinancing of a corporation; on the contrary, two corporations set up their assets and liabilities, and a third was organized, which in turn acquired all the property and assumed all the liabilities of the other two. Article one of the so-called merger agreement reads as follows:

"Article one. * * * Said corporation [plaintiff] shall be and is distinct from each of its constituent corporations parties hereto, and is created by consolidation of said constituent corporations, thereby forming a new consolidated corporation, hereinafter called the 'Consolidated Company.'"

Section 10 of the quoted taxing act imposes an income tax upon a corporation "no matter how created or organized," and when the record discloses, as it does in this case, that a gain and profit was realized through the acquisition and subsequent sale of real property by a corporation, the commissioner, it seems to the court, was obligated under the law to charge the profit to the corporate entity which in fact received it. See in this connection *United States* v. *Flannery*, 268 U. S. 98; *Goodrich* v. *Edwards*, 255 U. S. 527; *Walsh* v. *Brewster*, 255 U. S. 536.

Reporter's Statement of the Case

The second contention that the plaintiff is entitled to a valuation of the realty involved as of the date of October 11, 1915, is, we think, without merit from the standpoint of fact. While testimony was adduced to prove an increase in value over the price paid for the lands by the plaintiff's predecessor corporations, there is nothing in the record to sustain a finding that the plaintiff parted with the established valuation as of October 11, 1915, when the lands were acquired by it. The plaintiff carried upon its books all the parcels of land at their original cost price, and while this, of course, is not conclusive as to value, it is most persuasive of the fact that what plaintiff did at the time was to acquire the lands at the stated price. In addition to this, the plaintiff in purchasing the assets of its two predecessor corporations issued its own capital stock dollar for dollar for the outstanding stock of the two predecessor corporations, and it is impossible to segregate from the transaction and find as a fact that the plaintiff paid more than the amount charged upon its books for the land. This amount was the amount carried on the books of the Seaboard Air Line Railway, the original purchaser of the stock, and the agreement indicates clearly that the plaintiff accepted its predecessors' valuation of assets, and paid accordingly.

The petition will be dismissed. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

BERG BROTHERS MANUFACTURING CO. v. THE UNITED STATES

[No. H-436. Decided March 11, 1929]

On the Proofs

Excise taxes; timers; automobile parts.—See *Atwater Kent Mfg. Co. v. United States*, 62 C. Cls. 419.

The Reporter's statement of the case:

Mr. Alex Koplin for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Reporter's Statement of the Case

The court made special findings of fact, as follows:

I. The Berg Brothers Manufacturing Company, during the times hereinafter mentioned, was and now is a corporation organized, existing, and operating under and by virtue of the laws of the State of Illinois, with its principal place of business located at Chicago, Illinois.

II. Plaintiff, during the period in question, manufactured timers for Ford internal-combustion engines. A timer is a device for distributing electric current to the different cylinders of an internal-combustion engine. Its function is to regulate the spark so that the current will fall evenly through the cylinders. They may be used on all internal-combustion engines. The timer made by plaintiff was manufactured for the engine used in either the Ford tractor or automobile. It fits on the engine, which is a part of the tractor. No change whatever has to be made on the timer in order to use it on the tractor. It is put on the engine in the same way regardless of whether the engine is used on the tractor or automobile. It is unnecessary to bore any holes or make any adjustment in order to use it on the engine of the tractor and it is fastened on the engine of the tractor in exactly the same way as it is fastened on the engine of the automobile. Plaintiff's timers could be used on any Ford engine.

The only difference between the timer made by the plaintiff and that made by the Milwaukee Motor Products Company, called the Milwaukee timer, is in the case, the Milwaukee timer being in a bakelite case while the timer made by the plaintiff is in a steel case.

Plaintiff's timer was advertised as "Berg timers for the Ford"; also as "Berg timers for Fords."

III. The plaintiff made and filed its manufacturer's excise-tax returns monthly for the period May, 1922, to February, 1926, inclusive, showing the amount of tax due thereon, which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff for the months, in the amounts, and on the dates hereinafter set forth, as follows:

Opinion of the Court

Period	Year	Month	Year	Page	Line	Amount	Date paid
May	1922	July	1922	24	4	$194.87	7/7/22
June		Aug		32	0	229.35	8/5/22
July		Sept		30	0	165.58	9/7/22
Aug		Oct		29	6	173.97	10/5/22
Sept		Nov		52	2	260.19	11/13/22
Oct		Dec		62	1	226.08	12/9/22
Nov		Jan	1923	36	7	218.55	1/8/23
Dec		Feb		68	6	305.64	2/14/23
Jan	1923	Mar		32	8	376.84	3/7/23
Feb		Apr		10	6	451.84	4/6/23
Mar		May		57	9	447.93	5/10/23
Apr		June		121	6	638.15	6/30/23
May		July		36	0	510.71	7/12/23
June		Aug		13	2	257.65	8/3/23
July		Sept		25	7	450.91	9/8/23
Aug		Oct		28	9	301.05	10/9/23
Sept		Nov		2	3	195.57	11/1/23
Oct		Dec		58	7	471.53	12/11/23
Nov		Jan	1924	48	0	257.97	1/10/24
Dec		Feb		26	7	166.23	2/9/24
Jan	1924	Mar		32	44	308.44	3/8/24
Feb		Apr		53	0	253.41	4/8/24
Mar		May		13	7	378.30	5/3/24
Apr		June		109	0	312.87	6/28/24
May		July		12	2	307.54	7/3/24
June		Aug		28	0	267.64	8/8/24
July		Aug		81	9	200.08	8/28/24
Aug		Sept		56	7	198.01	9/29/24
Sept		Oct		49	6	249.58	10/29/24
Oct		Nov		42	8	177.84	11/29/24
Nov		Dec		45	7	175.06	12/27/24
Dec		Jan	1925	47	2	157.63	1/28/25
Jan	1925	Feb		38	4	233.30	2/28/25
Feb		Mar		45	9	189.04	3/30/25
Mar		Apr		44	7	198.25	4/27/25
Apr		May		43	9	161.13	5/29/25
May		June		45	0	186.26	6/26/25
June		July		45	2	189.12	7/28/25
July		Aug		33	5	199.45	8/24/25
Aug		Sept		46	9	219.42	9/30/25
Sept		Oct		37	2	182.41	10/27/25
Oct		Dec		2	1	238.00	12/1/25
Nov		Dec		41	1	205.08	12/28/25
Dec		Jan	1926	33	7	56.51	1/26/26
Jan	1926	Mar		5	4	226.19	3/2/26
Feb		Mar		41	9	156.12	3/30/26

IV. On July 6, 1926, plaintiff filed its claim for refund, #314,071 of manufacturer's excise tax so paid on timers during the period May, 1922, to February, 1926, in the amount of $11,370.49, which was duly rejected by the Commissioner of Internal Revenue on March 16, 1927.

The court decided that plaintiff was entitled to recover, with interest.

SINNOTT, *Judge*, delivered the opinion of the court:

Plaintiff in this suit seeks to recover the sum of $11,370.49, manufacturer's excise tax paid during the period from May, 1922, to February, 1926, on timers manufactured by plaintiff.

The sole question involved is whether the timer made and sold by plaintiff is taxable under section 900 of the revenue act of 1921, 42 Stat. 227, 291, and section 600 of the revenue act of 1924, 43 Stat. 253, 322. The timer made by plaintiff may be used on any Ford engine. They may be used without change on the engine used in either the Ford tractor or automobile. The only difference in the timer made by plaintiff and that made by the Milwaukee Motor Products, Inc., called the Milwaukee timer, is in the case, the Milwaukee timer being in a bakelite case, while the timer made by plaintiff is in a steel case.

In the case of the *Milwaukee Motor Products, Inc.*, v. *United States*, No. H–40, decided by this court on October 22, 1928 [66 C. Cls. 295], involving the revenue acts of 1918 and 1921, and the revenue act of 1924, the two latter acts being the same acts as are involved in this case, we held that the Milwaukee timers were not taxable under said acts. In the *Milwaukee Motor Products, Inc., case, supra*, we found that Ford engines were used on light tractors, stationary power plants, farm cultivators, ice-harvesting equipment, bean-cleaning equipment, farm power plants, concrete mixers, fire-fighting apparatus, air compressors, locomotive equipment, hoists, shop mules, marine engines, street flushers, pumping, light grinding, and saw equipment; that the engines used on the Ford tractors were used on stationary power plants, road graders, snow plows, road rollers, hoists, boats, saws, sprinklers, street sweepers, and locomotive equipment.

It is apparent that plaintiff's timers were not specially designed nor primarily adaptable only for use on or in connection with automobiles. The *Milwaukee Motor Products, Inc., case, supra*, is decisive of the present case. See also *Atwater Kent Manufacturing Co.* v. *United States*, 62 C. Cls. 419; *Wells Manufacturing Co.* v. *United States*, No. H–44, decided by this court October 22, 1928 [66 C. Cls. 283].

Judgment should be awarded in favor of the plaintiff. It is so ordered.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

MONTGOMERY COTTON MILLS, INC., v. THE UNITED STATES[1]

[No. F-364. Decided March 11, 1929]

On the Proofs

Income and profits taxes; affiliated companies; consolidated returns.—Mere ownership by one company of all the capital stock of another does not under section 1331 of the revenue act of 1921 entitle them to a consolidation of their income and profits tax returns as affiliated companies. They must also bring themselves within one of the requirements of the proviso.

The Reporter's statement of the case:

Mr. H. Stanley Hinrichs for the plaintiff. *Mr. Frank S. Bright* was on the brief.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The Montgomery Cotton Mills, Inc., plaintiff, is a corporation organized and existing under the laws of the State of Alabama, with its principal offices in Montgomery, in said State.

II. At all times mentioned herein the First National Bank of Montgomery, Alabama, a corporation organized and existing under the laws of the United States, has owned all of the capital stock of the plaintiff corporation. (There were some qualifying shares in the name of the directors, but those shares were endorsed and held by the bank.)

III. In 1911, the said First National Bank of Montgomery, Alabama, requested the Comptroller of the Currency to renew its charter as a national bank. At that time said bank owned all of the capital stock of the Montgomery Cotton Mills, consisting of 1,000 shares of the par value of $100 each. A United States bank examiner investigated the condition of said bank, and was not willing to include as live assets of the bank the stock of the Montgomery Cotton Mills.

[1] Certiorari denied.

IV. On or about June 11, 1912, the said First National Bank of Montgomery, Alabama, caused the following proceedings to be taken: The plaintiff company was organized with a capital stock of $50,000. All of the assets of the Montgomery Cotton Mills were sold to the Montgomery Cotton Mills, Inc., in exchange for bonds of the Montgomery Cotton Mills, Inc., in the sum of $100,000, and the capital stock of the Montgomery Cotton Mills, Inc., in the sum of $50,000. The said First National Bank of Montgomery, Alabama, received said $100,000 in bonds and $50,000 in stock of the Montgomery Cotton Mills, Inc., in exchange for $100,000 capital stock of the Montgomery Cotton Mills.

V. After this there was no change in the financial relationship between the said bank and the plaintiff corporation prior to December 31, 1917. Said bank and plaintiff corporation filed their income and profits tax returns under the revenue act of 1917 separately, and the Federal taxes shown to be due thereunder were paid. The plaintiff filed a claim for refund on January 23, 1924, in the amount of $29,218.98, which was finally rejected February 1, 1926.

VI. If the tax liability of said bank and said plaintiff corporation are computed upon the basis of a consolidated return, the tax liability of the plaintiff corporation would be $19,909.00 less than was paid upon behalf of plaintiff corporation to the United States Government for the year 1917.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This action was begun to recover a refund due, as it is alleged, on account of overpayment of income and excess-profits taxes for the year 1917. The facts in the case are briefly and concisely stated in the findings.

The claim is that the plaintiff and the First National Bank of Montgomery were affiliated corporations within the meaning of the statute, and for the year 1917 are entitled to have the Federal excess-profits taxes computed on the basis of a consolidated return in view of the fact that the First Na-

tional Bank of Montgomery owned all the stock of the plaintiff corporation.

Section 1331 of the revenue act of 1921, 42 Stat. 227, 319, provides among other things that:

"(b) For the purpose of this section a corporation or partnership was affiliated with one or more corporations or partnerships (1) when such corporation or partnership owned directly or controlled through closely affiliated interests or by a nominee or nominees all or substantially all the stock of the other or others, or (2) when substantially all the stock of two or more corporations or the business of two or more partnerships was owned by the same interests: *Provided*, That such corporations or partnerships were engaged in the same or a closely related business, or one corporation or partnership bought from or sold to another corporation or partnership products or services at prices above or below the current market, thus effecting an artificial distribution of profits, or one corporation or partnership in any way so arranged its financial relationships with another corporation or partnership as to assign to it a disproportionate share of net income or invested capital."

It will be observed that in order to come within the statute there are two requisites, namely, (1) and (2) of the statute quoted, and these requisites are further limited by a proviso. As the bank owned directly all the stock of the plaintiff corporation, the requisites of (1) were complied with. This, however, alone and by itself is not sufficient. The plaintiff must bring itself within the requirements of the proviso. The situation is so manifestly not included in the first two requirements of the proviso that it is not necessary to give them any consideration. The last provision of the proviso requires that one of the corporations alleged to be affiliated should have so arranged its financial relationships with the other "as to assign to it a disproportionate share of net income or invested capital." There is nothing in the evidence or facts to show that this has been done. In short, none of the three requirements of the proviso are shown to exist.

It follows that plaintiff's petition must be dismissed, and it is so ordered.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

ARTHUR N. BROWN v. THE UNITED STATES

[No. F-350. Decided March 11, 1929]

On the Proofs

Tenure of office; professor librarian, U. S. Naval Academy.—Where a person accepts employment in the Government service, executes a required oath of office and enters upon his duties, his services are performed under an appointment to office and not under a contract of employment, notwithstanding the employment is tendered and accepted for a stated term of years, and his removal from office before the expiration of the stated term is within the power of the appointing officer.

The Reporter's statement of the case:

Mr. James W. Carmalt for the plaintiff.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff for some time prior to 1919 had been employed as professor librarian at the United States Naval Academy. On May 1, 1919, he was given the following appointment:

UNITED STATES NAVAL ACADEMY,
Annapolis, Maryland, May 1, 1919.

To: Professor Arthur N. Brown, Librarian.
Subject: Appointment.
References:

(a) Superintendent's letter No. 32-2 of April 2, 1919, to Secretary of the Navy.
(b) Bureau of Navigation letter No. 927-1014, of April 9, 1919, to Naval Academy.
(c) Superintendent's letter No. 32-2 of April 14, 1919, to Secretary of the Navy.
(d) Bureau of Navigation letter No. 927-1028, of April 15, 1919, to Naval Academy.

In accordance with references, you are hereby appointed professor librarian, Naval Academy, at $3,600 per annum for

the period from July 1, 1919, by which date you will execute the required oath, to July 1, 1924, inclusive.

The plaintiff accepted said appointment and executed oath of office and entered upon the discharge of his duties as professor librarian.

II. In May, 1920, the Secretary of the Navy issued regulations under authority conferred upon him by section 7, of the act of May 18, 1920, 41 Stat. 603, increasing the salary of professors at the Naval Academy. In accordance therewith the base salary of professor was fixed at $4,300 per annum with an increase of $100 per annum for each year of approved service subsequent to July 1, 1919, until a maximum of $5,000 was reached.

III. On September 2, 1921, the following regulation was issued:

NAVAL ACADEMY ORDER NO. 52–21

With the approval of the Secretary of the Navy, on and after 30 June, 1922, all professors, assistant professors, associate professors, and instructors, without exception, who will have attained the age of sixty-five years, or who will during the fiscal year for which they seek appointment attain the age of sixty-five years, shall automatically sever their relations with the Naval Academy.

IV. The plaintiff, attaining the age of 65 years during the fiscal year 1922, received the following communications from the Secretary of the Navy and the Superintendent of the Naval Academy:

UNITED STATES NAVAL ACADEMY,
Annapolis, Maryland, January 28, 1922.

To: Professor Arthur N. Brown.
Subject: In re termination of appointment.

1. I inclose you, herewith, for your information a copy of the letter forwarded this date to the department relative to the termination of your appointment on 30 June, 1922, in accordance with the reference contained in this copy.

2. Please acknowledge receipt of this communication.

(Signed) HENRY B. WILSON.

* * * * *

(Copy of inclosure)

UNITED STATES NAVAL ACADEMY,
Annapolis, Maryland, January 28, 1922.

To: Secretary of the Navy (Bureau of Navigation).
Subject: Termination of appointment.
Reference: Bureau's letter N-4 LD*G, of 30 August, 1921.

1. In compliance with paragraph 1 of the above reference, it is recommended that the appointment of Professor Arthur N. Brown terminate on 30 June, 1922, he becoming 65 years of age during the coming year.

(Signed) HENRY B. WILSON.

THE SECRETARY OF THE NAVY,
Washington, 21 December, 1921.

To: Professor Arthur N. Brown.
Via: Superintendent, Naval Academy, Annapolis, Maryland.
Subject: Termination on account of age of appointment as Professor at Naval Academy.

1. In accordance with the department's decision approving the recommendation of the Superintendent of the Naval Academy that the services of professors who reach the age of sixty-five years be not retained at the academy, I beg to inform you that your appointment will terminate on 30 June, 1922.

2. I take this occasion to thank you most heartily for your valuable service, which has covered a long period of usefulness at the Naval Academy.

(Signed) EDWIN DENBY.

* * * * *

V. The plaintiff acknowledged receipt of the termination of his appointment on January 30, 1922, and protested to the Superintendent of the Naval Academy. Receiving no modification thereof the plaintiff on July 1, 1922, protested to the Secretary of the Navy. On July 28, 1922, the then Acting Secretary of the Navy wrote the plaintiff as follows:

"* * * I have to advise that all the elements entering into the termination of your appointment were thoroughly considered prior to taking the action complained of. For the reasons which determined my action in terminating your appointment on June 30, 1922, I respectfully decline to reinstate you in the position of professor as librarian at the Naval Academy."

VI. During the period from July 1, 1922, to June 30, 1924, no person was appointed to fill the vacancy of professor as librarian created by the removal of the plaintiff from that position on June 30, 1922. The plaintiff was at all times from July 1, 1922, to June 30, 1924, physically and mentally capable of performing the duties of the office from which he was removed, he was diligent in his efforts to secure other employment, and during the above-mentioned period earned only $15.00.

VII. If the plaintiff is entitled to the salary of the office of professor librarian at the Naval Academy from July 1, 1922, to June 30, 1924, he is entitled to the sum of $9,300.00.

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

On May 1, 1919, plaintiff, Arthur N. Brown, was appointed professor librarian at the United States Naval Academy, at the rate of $3,600 per annum, for the period from July 1, 1919, to July 1, 1924. The appointment was by letter from the Secretary of the Navy, dated May 1, 1919, which contained the following statement:

"In accordance with references, you are hereby appointed professor librarian, Naval Academy, at $3,600 per annum for the period from July 1, 1919, by which date you will execute the required oath, to July 1, 1924, inclusive."

In May, 1920, the salary of professors at the Naval Academy was changed to $4,300 for the fiscal year 1920, with an increase of $100 per annum for each year of satisfactory service thereafter until the maximum of $5,000 was reached.

On September 2, 1921, an order was issued by the Naval Academy providing that professors upon attaining the age of 65 years should sever their relationship with the academy. In accordance therewith plaintiff was notified that inasmuch as he would reach that age during the coming year his appointment as professor would terminate June 30, 1922.

The plaintiff bases his right of recovery on the theory that at the time of the promulgation of the Naval Academy order above mentioned he was serving under a five-year contract, and that said contract could not be annulled or

abrogated by the issuance of such order during the contract period.

We are unable to agree with this contention. Plaintiff's services were being performed under an appointment to office, and his rights and duties are to be controlled by the principles applicable to such a situation. If the reciprocal rights and duties of the parties in this case are to be controlled by a five-year contract of employment, then the Government would be under obligation to continue the services of a professor librarian throughout the entire period, even though it might develop during the term that, in the public interest, such services were no longer needed. Indeed, the record in this case shows that during the period July 1, 1922, to June 30, 1924, no librarian was appointed to fill the position vacated by plaintiff, which would seem to indicate that a librarian might properly be dispensed with. But if plaintiff's theory is correct, the Government would be powerless to abolish the office during the five-year period. It could make no change, however desirable, that would interfere with plaintiff's employment. It is a matter of common knowledge that the Government prescribes the rights and the duties of persons employed or appointed for public service, and may at any time change same to suit the exigencies of the service, without the consent of the employee; or it may abolish the position itself before the expiration of the term of employment or appointment. The employee may likewise resign at any time, although appointed for a definite term, without the consent of the Government, and without incurring any liability to the Government, by so doing.

It must be remembered that plaintiff was not a civil service employee entitled to the protection of the civil service regulations. He was appointed under an act of Congress of August 29, 1916, 39 Stat. 607, which provides:

"The Secretary of the Navy is authorized to employ at the Naval Academy such number of professors and instructors, including one professor as librarian, as in his opinion may be necessary for the proper instruction of the midshipmen; * * *."

Syllabus

The power to appoint implies the power to remove. This doctrine was announced in the case of *Keim* v. *United States*, 33 C. Cls. 174, and has since been consistently followed. In the case of *Stilling* v. *United States*, 41 C. Cls. 66, the court in commenting on this principle stated:

"In *United States* v. *Murray* (100 U. S. R. 536) it was held by the Supreme Court that there was nothing to prevent the Secretary of the Treasury from putting an employee on furlough without pay at any time where the exigencies of the service required it; that if an employee might be dismissed absolutely it was difficult to see why such employee might not be furloughed without pay, that being in effect a partial dismissal. Applying this rule as if no exigencies of the service required action (*a rule based upon the theory that the Government does not contract to keep its employees in the service*) because of the right of the appointing power to dismiss at discretion, with no general supervising power in the courts to review the exercise of executive authority as declared in *Keim* v. *United States* (33 C. Cls. R., 174; 177 U. S. R. 290), it must be held that the plaintiff can not recover from the time the Secretary of War furloughed without pay to the time the employee was restored to duty." (Our italics.)

It is manifest, we think, that the Secretary of the Navy had the power of removal as well as the authority to appoint plaintiff to the position from which he was removed. For cases in point see *Butler et al.* v. *Pennsylvania*, 10 Howard 402; *Howard* v. *United States*, 22 C. Cls. 305.

Plaintiff is not entitled to recover, and it is so adjudged and ordered.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

OAK INVESTMENT CO. v. THE UNITED STATES

[No. C–765. Decided March 11, 1929]

On the Proofs

Lease; description of premises; warranty as to area.—Where a lease identifies the office rooms rented, describes them as containing

approximately so many square feet of floor space, and specifies the rental as a definite sum per annum without any rate per square foot, the description of the area is not a warranty, and does not, in the absence of bad faith, relieve the lessee from paying the full rental because it is later discovered that the premises contain a less number of square feet.

The Reporter's statement of the case:

Mr. Charles F. Consaul for the plaintiff. *Moyers & Consaul* were on the brief.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. On June 3, 1921, the United States entered into a lease with the Oak Investment Company, under which it acquired possession of certain space in the Standard Parts Building, located in Cleveland, Ohio. The provisions of said lease, here material, are as follows:

"1. That the said lessor shall, and by these presents does, hereby lease, demise and let to the lessee the following described premises, to have and to hold the same with their appurtenances unto the lessee, for the term beginning with the date of occupancy and ending June 30, 1921, at the rate per annum and under the conditions named below, viz:

"Eight rooms, known as Nos. 500, 501, 502, 503, 507, 509 and 511, containing approximately forty-one hundred (4100) square feet of floor space on the fifth floor of the Standard Parts Building, 1785 East 11th Street, Cleveland, Cuyahoga County, Ohio. Satisfactory water, heat, electric light, elevator and janitor service will be furnished by the lessor without additional charge.

"2. That the rent reserved hereunder shall be at the rate of Seven Thousand and Ninety-six and 15/100 ($7,096.15) Dollars per annum, payable in equal monthly installments in arrears.

* * * * *

"11. That the lessee reserves the right to quit, relinquish and give up the said premises at any time within the period for which this lease is made, or may be renewed, by giving to the said lessor thirty (30) days' notice thereof in writing.

"12. That at the option of the lessee, this lease with all its covenants and agreements, may be renewed yearly as

often as the needs of the Bureau of War Risk Insurance may require, not extending, however, beyond June 30, 1922, contingent upon the availability of appropriations from which rent may be paid."

II. On termination of the term, the Government exercised its right of renewal, and by correspondence it was agreed that the new term should continue until June 30, 1922.

From June 3, 1921, until April 1, 1922, plaintiff was paid by the United States the rent provided under the lease. The United States continued in possession of the premises having an area of 2,726.75 square feet, until the expiration of the extended lease term, namely June 30, 1922, and after vacating the premises on said last-mentioned date, declined to pay the agreed rent covering the period from April 1, 1922, to June 30, 1922, amounting to $1,774.05.

III. On November 8, 1921, the United States and the plaintiff entered into a second lease covering additional space adjacent to that covered by the lease of June 3, 1921. Upon this lease the defendant rented two rooms, Nos. 513 and 514, containing approximately 785 square feet of floor space, for the term beginning November 1, 1921, and ending June 30, 1922, at the rate of $1,358.05 per annum, payable in monthly installments.

IV. Under said lease of November 8, 1921, the plaintiff was paid the agreed rental until May 1, 1922. The United States continued to occupy said premises after said date and until the expiration of the lease term on June 30, 1922, and after vacating the premises declined to pay rent covering the period from May 1, 1922, to June 30, 1922, amounting to $226.34.

V. Refusal to pay rental covering the period mentioned was due to the fact that the leased premises covered by the first lease were described as containing approximately an area of 4,100 square feet, whereas they were found to contain an area of 2,726.75 square feet, by reason whereof it was asserted that the agreed rental should be fixed at a proportionately less sum per month, and that there had been on such basis an overpayment to plaintiff.

VI. Prior to the preparation and signing of the lease of June 3, 1921, representatives of the defendant who were familiar with the office space needed for Government purposes inspected the premises covered by the said lease; and a blue print showing the floor plan of the premises proposed to be leased, drawn to scale, was furnished the representatives of the defendant, the office space being enclosed within a red line with this explanation: "Units within this line are the proposed offices." The lease does not state as to whether the space referred to as approximately 4,100 square feet meant gross or net area. In Cleveland, at the time when the said lease was entered into, it was customary to rent office space on either basis.

VII. The difference between the rental provided for in the contract of the premises which plaintiff bound itself to furnish to the defendant and the rent paid to the plaintiff amounts to the sum of $2,000.39.

If the defendant was only bound to pay for the leased premises at the rate per foot which would have been paid had there been 4,100 square feet in the rooms rented, then the plaintiff has been overpaid the amount of $433.96.

The court decided that plaintiff was entitled to recover $2,000.39.

GREEN, *Judge*, delivered the opinion of the court:

The defendant leased of the plaintiff certain rooms described as "containing approximately 4,100 square feet of floor space." It was later discovered that these rooms contained only 2,726.75 square feet. When the lease was terminated, if the defendant was bound to pay the rent at the monthly rate provided in the lease, there was due and still unpaid the sum of $2,000.39; but, if, under the lease, the defendant was bound to pay only $1.73} per square foot per annum (being the rate at which defendant would have paid if there had been 4,100 feet), the plaintiff has been overpaid in rental the sum of $433.96.

The findings show that the lease was ambiguous. No definite amount was rented, the lease stating that the rooms

contained approximately 4,100 square feet. In the case of *Lipshitz & Cohen* v. *United States*, 269 U. S. 90, a quantity of junk was sold in different parcels, the weight of which was listed, but the schedule upon which plaintiffs relied stated, "The weights as shown below are approximate and must be accepted as correct by the bidder," and it was held that there was no warranty as to the weight. The same rule was applied in the case of *Brawley* v. *United States*, 96 U. S. 168, in which it was said, in substance, that where a quantity was named with the qualification of "about" or "more or less," or words of like import, the naming of the quantity is not regarded as in the nature of a warranty but only an estimate, and that good faith is all that is required of the party making it. While the variance is large in the case at bar, it is not as great as in the *Lipshitz & Cohen case*, *supra*, where the amount was only about one-half of the approximate amount stated, and no claim is made that the statement was not made in good faith. Moreover, the representatives of the defendant, prior to making the lease, inspected the premises and were given a blue print of the rooms rented, drawn to scale, from which a calculation could very easily and quickly have been made of the amount of floor space contained therein. The testimony shows that in Cleveland at that time it was customary to rent office space either by the gross or net area contained therein. The gross area included halls, toilets, closets, etc. The rooms rented by defendant comprised about one-half of the space of the story of the building upon which they were located.

We conclude that the statement of the amount of floor space was not intended as a warranty, and as there is no claim that it was not made in good faith, we think the plaintiff is entitled to recover the amount of the unpaid rent under the terms of the lease, and judgment will be entered accordingly.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

JOHN RUSSELL SMITH v. THE UNITED STATES

[No. E-587. Decided March 11, 1929]

On the Proofs

Expropriation of shipbuilding contract, act of June 15, 1917; statute of limitations.—Congress did not, by section 2 (c) of the Merchant Marine Act, 1920, set definitely the period within which the United States Shipping Board should act on claims for just compensation under the act of June 15, 1917, and where the board has delayed acting on such a claim, the claimant may invoke the jurisdiction of the court within the statutory period (sec. 156, Judicial Code), following the final judgment of the board.

Same; vessels contracted for.—
See *Luckenbach S. S. Co. et al.* v. *United States*, 64 C. Cls. 59.

The Reporter's statement of the case:

Mr. Chester A. Gwinn for the plaintiff. *Humphreys & Day* were on the briefs.

Mr. W. W. Nottingham, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Dan M. Jackson* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff, John Russell Smith, is a resident of the city of Fort William, in the Province of Ontario, and is a citizen of the Dominion of Canada. The Government of the said Dominion accords to citizens of the United States the right to prosecute claims against it.

II. Prior to August 3, 1917, plaintiff was engaged in the grain business, operating elevators and shipping grain on the Great Lakes.

III. The Globe Shipbuilding Corporation was organized as a corporation under the laws of the State of Wisconsin under date of February 6, 1917; on June 25, 1917, was reorganized as a corporation under the laws of the State of Delaware, and during all the time hereinafter mentioned it had its principal office and place of business in the city of Superior, in the said State of Wisconsin.

The Globe Shipbuilding Co. was on August 3, 1917, engaged in the construction of steel ocean-going vessels of the *Friederickstadt* type and had prepared blue prints and plans for said standard type of vessel. On August 3, 1917, the shipbuilding company had four of such vessels under contract, but the actual work of construction had not commenced on any of same.

IV. On June 8, 1917, the plaintiff entered into two written contracts with the Globe Shipbuilding Co., which contracts are set forth in Exhibits I and II to the petition and made a part of this finding by reference.

V. The plaintiff is the sole owner of the claim herein; no assignment or transfer of his interest or any part thereof or interest therein has been made, and plaintiff has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government of the United States.

VI. On July 11, 1917, the President, by virtue of authority vested in him by the act of Congress of June 15, 1917, by an Executive order, delegated the powers conferred upon him by said act to the United States Shipping Board Emergency Fleet Corporation. Under the authority so conferred upon it, the Fleet Corporation on August 3, 1917, issued a general requisition order requisitioning all power-driven cargo-carrying and passenger vessels above 2,500 tons deadweight capacity under construction in the United States, and on August 24, 1917, served on the Globe Shipbuilding Co. a notice and order of requisition by telegram and letter as follows:

U. S. SHIPPING BOARD,
Washington, August 24, 1917.

GLOBE SHIPBUILDING COMPANY,
Superior, Wisconsin.

By virtue of an act approved June fifteenth and authority delegated to Emergency Fleet Corporation by Executive order of July eleventh, nineteen seventeen, all power-driven cargo-carrying and passenger vessels above twenty-five hundred tons deadweight capacity under construction in your yards and materials, machinery, equipment, and outfit thereto pertaining are hereby requisitioned by the United States and will be completed with all practicable dispatch. Letter follows.

W. L. CAPPS, *General Manager.*

Reporter's Statement of the Case

UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORATION,
Washington, August 24, 1917.

GLOBE SHIPBUILDING COMPANY,
Superior, Wisconsin.

GENTLEMEN: By virtue of an act of Congress approved June 15, 1917, entitled "An act making appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," and by authority delegated to the United States Shipping Board Emergency Fleet Corporation under Executive order of the President, dated July 11, 1917, all power-driven cargo-carrying and passenger ships, above 2,500 tons d. w. capacity, under construction in your yard and certain materials, machinery, equipment, outfit, and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.

On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction of said requisitioned ships under construction and will prosecute such work with all practicable dispatch.

The compensation to be paid will be determined hereafter and will include ships, material, and contracts requisitioned.

You will furnish immediately general plans and detail specifications of the ships requisitioned, and copies of contracts and all supplemental agreements in relation thereto and full particulars as to owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts.

You will report immediately whether any adidtional contracts are under consideration and their character and extent, and will not enter into any additional contracts or commitments with respect to merchant tonnage without express authority from this corporation.

(Signed) W. L. CAPPS,
General Manager,
United States Shipping Board
Emergency Fleet Corporation.

WASHINGTON, D. C., *August 3, 1917.*

Among the vessels included within the above requisition order were the vessels known as hulls *103* and *104*, and being the same vessels which the Globe Shipbuilding Co. agreed to build for the plaintiff, John Russell Smith.

On August 30, 1917, the Fleet Corporation transmitted to the Globe Shipbuilding Co., through Mr. Henry Penton, district officer of the Fleet Corporation at Cleveland, Ohio, a letter requesting that he, Mr. Penton, inform the shipbuilder as follows:

"The ships now under construction at your plant and referred to above having been requisitioned by the duly authorized order of this corporation and title thereto taken over by the United States and an order having been placed with you by due authority to complete the construction of said ships with all practicable dispatch, you are further ordered by the President of the United States, represented by this corporation, to proceed in the work of completion heretofore ordered, in conformity with the requirements of the contract, plans, and specifications under which construction proceeded prior to the requisition of August 3, 1917, in so far as the said contract describes the ship, the materials, machinery, equipment, outfit, workmanship, insurance, classification, and survey thereof, including the meeting of the requirements of the said contract, and all tests as to efficiency and capacity of the ship on completion, and in so far as the contract contains provisions for the benefit and protection of the person with whom the contract was made, but not otherwise.

"All work will proceed under the inspection of such persons as have been or may hereafter, from time to time, be designated by this corporation for that purpose.

"For the work of completion heretofore and herein ordered, the corporation will pay to you amounts equal to payments set forth in the contract and not yet paid; provided, that on acceptance in writing of this order you agree that on final acceptance of the vessel to give a bill of sale to the United States in satisfactory form conveying all your right, title, and interest in the vessel together with your certificate that the vessel is free from liens, claims or equities, with the exception of those of the owner and then only to those set forth in the contract. Compensation to the shipbuilder for expedition and for extra work will, when deemed appropriate, be made the subject of a subsequent order.

"This order applies only to vessels *actually* under construction, and in accepting it the corporation expects you to inform it of the actual stage of construction of each vessel or the parts to be assembled therein on the date of requisitioning, August 3, 1917. The corporation reserves the right to decide whether or not a vessel was actually under construction on August 3, 1917, on consideration of the ascertained facts.

"In replying to this communication, please arrange to specify separately the vessels to which this order refers, and refer to the corresponding contract in sufficient terms for identification of it.

"Please furnish a copy of this to Globe Shipbuilding Company and ask for an early reply."

VII. On September 18, 1917, the Fleet Corporation wrote the Globe Shipbuilding Co. stating that—

"The following letters, relative to vessels requisitioned by this corporation, and under construction in your yard, have been received:

"August 30, relative to hull *101*.

"September 11, relative to hulls *101*, *103*, and *104*.

"You will proceed with the completion of these hulls to meet the requirements of the contracts under which these ships were being constructed by you for other parties on August 3, 1917.

"As just compensation for, and as the reasonable price of such completion, the corporation will pay to you sums equivalent to amounts which were unpaid on the said contracts August 3, 1917. Such payments will be made on receipt of vouchers submitted, through the district officer to this corporation on a form to be forwarded to you, and after certification by the district officer that such payments are due and warranted.

"In case of hulls *101* and *102* the corporation will make payment on account of material for these vessels up to the amount set forth in each contract; that is, $175,000.00, less such amounts as have been paid by previous owner for this purpose, upon receipt of a certified copy of bill of lading, where possible, or upon receipt of other satisfactory evidence, presented through the district officer, showing that a payment by the corporation on account of material to be used in hulls *101* and *102* was due, after which the payments will be made as provided in the contract.

"The district officer will be instructed to continue the inspection of work and material to insure that the vessel, when completed, will be equal in all respects to what was contemplated by the requirements of the contracts in force on August 3, 1917, and you will provide the district officer and his representatives all facilities necessary for the performance of this duty."

The Globe Shipbuilding Company acknowledged receipt of the above letter, stating that its contents had been noted and were of course accepted by it, and that it would en-

deavor to carry out the instructions contained therein to the best of its ability.

On September 19, 1917, the Emergency Fleet Corporation wrote plaintiff stating—

"On Aug. 3, 1917, the United States Emergency Fleet Corporation issued to the Globe Shipbuilding Company the notice or requisition, set forth in enclosure marked (a).

"In response to this communication the Globe Shipbuilding Company, the shipbuilders, informed us that you, as owners, or representatives of owners, had entered into a contract with them for the vessels listed below:

Hull	Type	D. w. ton	Date of contract
03	Cargo	3,500	3-3-14
04	do	3,500	3-3-14

"The corporation's district officer having charge of vessels in the district in which the shipbuilders are located has been instructed to take charge, for the corporation, of the completion of vessels now under construction, and has been authorized temporarily to take over your local inspecting officers at their present compensation. Will you please inform the district officer, Mr. Henry Penton, at Perry Payne Building, Cleveland, Ohio, the names of your representatives and their compensations, sending a duplicate to this office? Your cooperation with the corporation is invited.

"The corporation will consider payments to the contractor accruing since the date of requisition, upon the receipt of proper vouchers and adequate information to be forwarded through its district officers.

"You are requested, as soon as possible, to report to the corporation a statement in detail of the payments already made by you on each ship named above prior to the date of the requisitioning, August 3, 1917. This statement should be accompanied by the original vouchers and receipts and should be verified under oath by the proper corporate officer of your company.

"It is the present intention of the corporation to reimburse you promptly, so far as funds are available, for the payments heretofore made to the shipbuilder if after investigation of data submitted by you, such payments are found in order and in conformity with the contract requirements.

"At your further and early convenience, you are requested to submit to the corporation a statement of such indirect expenditures as you have made on account of each vessel,

for instance, the cost of superintendence, original design, interest on funds already paid, and the like. The matters mentioned will require careful audit, and in addition you may submit any other matters you deem pertinent.

"It will be perceived that the corporation presumes it is addressing this letter to the owners, or responsible representatives of the owners, or persons entitled to receive compensation on account of the requisition of the vessels listed above. The corporation requests that there be included in your response to this letter all evidence of ownership which is necessary to establish the right of those who are entitled to receive the compensation provided by law.

"The consummation of the orders herein, and heretofore transmitted, will be made the subject of later appropriate corporate action."

Said enclosure (a) is a copy of letter of August 24, 1917, from the Emergency Fleet Corporation to the Globe Shipbuilding Company, set forth in Finding VI.

VIII. Plaintiff was never in default in the performance of his part of the requirements of the contracts referred to above. The shipbuilding company on its part was ready and willing to perform all the requirements of said contracts to their completion. No payments by the plaintiff to the shipbuilding company were due or paid prior to August 3, 1917. However, the plaintiff had on deposit in the American Exchange Bank at Superior, Wis., the sum of $200,000, deposited solely to meet payments by it to the builder as required in said contracts, which sum of money was sufficient to pay the initial installments due under said contracts on September 1, 1917, and November 1, 1917, respectively. Said sum of $200,000 was returned to plaintiff.

IX. On August 3, 1917, the Globe Shipbuilding Co. had not commenced the physical construction of hulls *103* and *104*, and no material for the construction of said hulls had been delivered to the yard of the Globe Shipbuilding Co. The Globe Shipbuilding Co. during April, 1917, prior to entering into contracts with the plaintiff, had contracted with the Illinois Steel Co. and others for hull steel and hull castings to be used in the construction of hulls *103* and *104*. The steel for hull *103* was to be delivered as promptly after the receipt of specifications as conditions at Illinois Steel Co. mills would permit after January 1, 1918, and the steel

for hull *No. 104* was to be delivered as promptly after the receipt of specifications as conditions at Illinois Steel Co. mills would permit during the second and third quarters of 1918. The Globe Shipbuilding Co. had not on August 3, 1917, entered into contracts for the engines, boilers, auxiliaries, and equipment for the construction of hulls *103* and *104*.

Hulls *Nos. 103* and *104* were completed by the Globe Shipbuilding Co. substantially in accordance with the specifications attached to the contracts and according to the standard plans of the Globe Shipbuilding Co., the said shipbuilding company using in the construction of said vessels such hull steel and materials as had been ordered for their construction prior to August 3, 1917, and additional material, engines, boilers, auxiliaries, and equipment contracted for subsequent to the general requisition order of August 3, 1917. Hull *103* was completed and delivered to the Government on September 23, 1918, and hull *No. 104* was completed and delivered to the Government on October 18, 1918.

X. On September 15, 1917, the Globe Shipbuilding Co. wrote to the Fleet Corporation stating:

"As our superintendent, Mr. James McKellar, told you, we could hurry along the construction of *Nos. 101, 102, 103, 104* very much if the delivery of steel was expedited. The following are the concerns with whom we have contracts for steel, also dates of delivery:

"*No. 101.*—Tennessee Coal, Iron & Railroad Co. Dates of delivery: August, September, and October first, 1917.

"*No. 102.*—Illinois Steel Company. Dates of delivery: January, February, March, and April, 1918.

"*No. 103.*—Illinois Steel Company. Dates of delivery: 'As promptly after the receipt of specifications as conditions at seller's mills will permit after January first, 1918.'

"*No. 104.*—Illinois Steel Company. Date of delivery: 'As promptly after the receipt of specifications as conditions at seller's mills will permit during the second and third quarter of 1918.'

"Your assistance in expediting these deliveries would materially expedite the completion of these boats.

"May we have your instructions in this matter, and oblige."

The Fleet Corporation thereafter issued priority orders to the manufacturers of the steel and other materials re-

quired by the Globe Shipbuilding Co. for the construction of hulls *103* and *104*.

XI. On September 15, 1917, the Globe Shipbuilding Co. requested the Fleet Corporation to advance to it against the construction cost of hulls *103* and *104* the sum of $20,000 to be used for the purchase of electric cranes, stating that such investment would materially expedite the delivery of said vessels. This advance of $20,000 was authorized by the Fleet Corporation under date of September 26, 1917, and the electric cranes were thereafter installed.

XII. The total contract price for hulls *Nos. 103* and *104* was $620,000 each. On August 3, 1917, the plaintiff had made no payment to the shipbuilder on either hull, but had expended the sum of $3,000 for travel and other expenses in connection with negotiation of said contracts.

After the requisition, the Fleet Corporation paid to the shipbuilder for the constructing of hull *103*, the *Lake Medford*, the sum of $620,000 plus $59,583.57 for increased wages, overtime, increased freight rates, and guards. In addition, the Fleet Corporation expended for radio and navigation equipment placed on said vessel the sum of $6,514.95, and expended for inspection and supervision of work of construction the sum of $4,160.97, and paid to the shipbuilder the sum of $43,995.56 for changes and extras ordered by the Fleet Corporation. The actual deadweight tonnage of hull *103* upon completion was 3,390 tons.

The Fleet Corporation likewise paid to the shipbuilder for the construction of hull *104*, the *Lake Arline*, the sum of $620,000 plus $63,841.70 for increased wages, overtime, increased freight rates, and guards. In addition, the Fleet Corporation expended for radio and equipment placed on said vessels the sum of $5,619.16, and expended for inspection and supervision of the work of construction the sum of $5,156, and paid to the shipbuilder the sum of $47,369.12 for changes and extras ordered by the Fleet Corporation. The actual deadweight tonnage of hull *104* was 3,390 tons.

XIII. On September 6, 1917, the Globe Shipbuilding Company wrote plaintiff, acknowledging receipt of his wire of the 5th and stating that if it could get the payments on

103 and *104* by Tuesday or Wednesday of the following week it would be plenty of time; that the bills for the forgings were already beginning to come in and that the contract for boilers and engines had practically been agreed upon, both of which would require cash payment down upon signing.

On the same date the Globe Shipbuilding Company wrote the Emergency Fleet Corporation regarding *Nos. 103* and *104*, stating that—

"the forgings for these two boats are already being turned out by the American Bridge Company and we have already paid one draft on forgings for *No. 103* and are expecting more every day. We also have contracts practically agreed upon for engines and boilers for both of these boats. Just as soon as they are executed they will require cash payment down. We notified Mr. Smith last week, with whom we have these contracts, asking that his payments on both boats would be in this week or next.

"There are no further developments up to date except that we forwarded certified copies of drafts, bills of lading, and itemized statements of steel contained in each car to the district officer, as per your instructions, and sincerely hope that the payments can be rushed through in time so we may save our one-half of one per cent."

XIV. On September 11, 1917, the Globe Shipbuilding Co. wrote to the United States Shipping Board as follows:

"We note from recent letters received from you that in no case do you advance any more money than is actually invested by the shipbuilding company, in hulls, including, of course, pro rata share of overhead and other collateral expenses. Of course our contract for *Nos. 103–104* provided for the lump-sum payment on the first boat September first and on the second boat November first. Mr. Smith had notified us that he was about to make these payments. He evidently has received a copy of your letter and now doesn't think that he has any right to make the payments, and we presume under the circumstances he is right.

"Won't you kindly inform us how these last two contracts and also *No. 102* will be straightened out? We have invested some money in all of them and other contracts are pending which require payment of money—for instance, on the boilers and engines. If the Government takes these over we suppose you will want a detailed statement of these amounts; if you decide not to take them over, then it would oblige us if

you would notify us promptly so we can secure the money from Mr. Smith."

XV. On September 19, 1917, the United States Shipping Board wrote the plaintiff as follows:

"Referring to your letter of September 14, 1917, relative to two hulls you had contracted for with the Globe Shipbuilding Company, Superior, Wisconsin: You are informed that these vessels have been requisitioned by the Emergency Fleet Corporation, representing the United States, and the builder has been instructed to proceed with the completion of these boats, the corporation to make payments equivalent to those which were provided in the contract under which they were building.

"A representative of the corporation having charge of the inspection of these vessels has been instructed to direct the builders not to receive any further payments from the parties with whom they had the contracts for vessels that were requisitioned by the order of August 3, 1917.

"The evidence requested of you with regard to your ownership of these contracts, which must be established before any claims for reimbursement for expenditures made by you can be settled, is not requested by the Globe Shipbuilding Company, but by the corporation."

XVI. On October 11, 1917, the Globe Shipbuilding Company wrote H. J. Sterling, c/o Davidson & Smith, in which it stated that no doubt Mr. Smith had forwarded before that time the original contracts covering hulls *Nos. 103* and *104* which he had in his possession, to Admiral W. C. Capps, general manager of the Emergency Fleet Corporation; that if he had not already done so he should do so immediately, and that, of course, no expenditures were made by Mr. Smith for any of the subcontracts on these boats for outfit, machinery, boilers, or auxiliary machinery, as he purchased the ship complete from the Globe Shipbuilding Company, who was to furnish all of these necessary items; and also that the only expense he had actually been put to had been the necessary expenditures for railroad fare, time, etc. He further stated:

"Now, as to whether Mr. Smith voluntarily wants to agree to release the United States and the Emergency Fleet Corporation from all claims on account of the requisitioning of these ships, as is asked for in Mr. Penton's letter of September 18th, of course is a matter entirely up to him to decide. All I can say on this point is in talking with the

Manitowoc Shipbuilding Company day before yesterday, their general manager told me they would not contract for any ships for 1919 delivery or early in 1920 delivery, short of $200 per deadweight ton. Mr. Smith, of course, bought these boats at practically $177 per deadweight ton and, in addition, I should think would have difficulty in contracting now for as early deliveries as stated in his contracts for *Nos. 103–104*, with us consequently would be out the use of the boats during that time."

XVII. On October 29, 1917, Mr. H. Penton, district officer, United States Shipping Board at Cleveland, Ohio, sent the plaintiff the following letter:

"Subject: Globe Shipbuilding Co. Hulls *103* and *104*.

"DEAR SIR: Your letter of October 13th enclosing copies of original contracts on the above ships is received, but you have neglected to send therewith the statement requested in ours of September 18th to the effect that you have made no expenditure for their account.

"We note that you refuse to release the United States and the Emergency Fleet Corporation and are advising the corporation accordingly.

"With respect to the action of the Shipping Board in taking over the steamer *Britton*, have to say that this office has no knowledge of the circumstances and has no connection with the operations of the board in connection with existing ships."

XVIII. On February 9, 1918, the plaintiff wrote to the chairman, United States Shipping Board, as follows:

"Regarding my contracts with the Globe Shipbuilding Company, of Superior, Wisconsin, covering two Frederickstadt steel cargo carrying ships of 3,500 tons capacity, their hull numbers being *103* and *104*, which contracts were taken over by the United States Shipping Board Emergency Corporation early in August, 1917, would say that I would like information at least approximately as to when the Shipping Board will be ready to figure with me as to proper reimbursement for the taking over of these contracts.

"It has been absolutely impossible for me to duplicate these contracts, of course, in the United States, and so far I have been unable to secure any from the shipbuilders of Canada for the reason that they are busy with Government work.

"The price for duplicates of these boats, as near as I can ascertain from inquiries at various shipyards, is materially

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higher than that of my contracts. Furthermore, the dates of deliveries of these boats, which I had with the Globe Shipbuilding Company, were very favorable and would enable me to put the first one in commission late in the fall of 1918, or at the opening of the season 1919 at the latest. Now, there is no hope, even at the best, of my being able to get any ships to go into service anyway before 1921, consequently this loss of earnings is a large item."

The Shipping Board replied to this letter on February 18, 1918, stating that—

"The correct procedure for him to follow was to prepare a full statement of all of the facts, showing particularly that he was the owner of the ships and the contracts therefor and that nobody else had any interest in them; that the statement should be in affidavit form, and annexed to it should be the original contracts under which the ships were being constructed, together with original proof of payment of all sums of money; that if he claimed any sums other than reimbursement of sums which he paid to the shipbuilding company the basis of such claims must be made clearly apparent; that the corporation would act on the matter promptly as soon as these necessary facts were received; and that he would then be required to execute proper releases of claims against the United States in accordance with the provisions of the urgent deficiency act of June 15, 1917."

XIX. On March 27, 1918, the Shipping Board wrote plaintiff asking him to submit as soon as convenient his claim for just compensation for the boats in question, stating that no particular form was suggested or necessary in filing a claim, but that he was requested to include the information and meet the requirements set forth in a paper enclosed and dated March 16, 1918. The letter also stated that in the event he had already filed a claim but had not furnished the necessary information in the form and manner requested, then to amend his claim to the extent necessary to meet the requirements in question.

The requirements of March 16, 1918, relative to claims for just compensation, follow:

1. Original contract for construction of boat.
2. Original of all assignments or transfers of said contract.

3. Statement and originals of all mortgages, liens, or incumbrances (including broker's claims, if any) against the boat and/or contract, together with original entry or evidence of satisfaction and cancellation thereof.

4. Release from all former owners of boat or contract.

5. Release from shipbuilder together with certificate showing absence of any claim on part of shipbuilder against the ship or contract.

6. Statement of cost and contract to claimant, together with original evidence of payments, including checks and receipts.

7. Proof by affidavit of all expenditures for which claimant seeks reimbursement, all facts alleged in the claim and all papers attached to or made a part thereof.

8. Certified copy of all original papers requested when originals are not available and statement of reason why original is not submitted.

The Shipping Board wrote to the plaintiff an identical letter on July 15, 1918.

On April 17, 1918, plaintiff wrote Chas. Piez, Esq., vice president United States Shipping Board Emergency Fleet Corporation, the following letter, affidavit, and claim for compensation:

"DEAR SIR: Absence from the city on a trip to Central America has delayed for a long time my reply to your favor of the 18th ult., in relation to the commandeering of my contracts with the Globe Shipbuilding Company, covering hulls *Nos. 103 and 104*.

"I now hand you herewith affidavit and other data, which I think cover the situation fully in regard to the commandeering of these boats. The original contracts were mailed under registered cover on the 13th of October last, to H. Penton, Esq., Perry-Payne Building, Cleveland, Ohio. Should I not have covered the matter fully, and you should desire further information, I stand ready at any time to furnish same.

"Thank you for the statement in your letter to the effect that this matter will be disposed of promptly or as soon as the necessary facts have been received. I assure you I am not seeking for anything unreasonable in this settlement, but as a business man I feel you will appreciate the position

I have been put in on account of my contracts having been commandeered by the Emergency Fleet Corporation."

Minutes of meeting of the board of directors of the Globe Shipbuilding Company, held in the company's office, Superior, Wisconsin, on April 5th, 1918, at eleven o'clock in the morning.

All of the directors being present, the following resolution was offered and unanimously adopted:

Resolution

Resolved, That whereas this company on or about the eighth day of June, 1917, did enter into two contracts with Mr. John Russell Smith, of Fort William, Ontario, for the construction and delivery of two steel cargo ships, as stated in said contracts, being our yard *Nos. 103–104*, for the sum of six hundred twenty thousand (620,000) dollars for each ship, payable as stated in said contracts; and

Whereas the United States Government, on or about August, 1917, requisitioned said ships; and

Whereas ever since that date this company has been building said ships for the Emergency Fleet Corporation, having notified said John Russell Smith of said requisitioning on the part of the Government; and

Whereas said John Russell Smith has asked this company several times that under the circumstances he be released in writing from above contracts and that this company further release any and all claims against the ships or any claims arising under said contracts as far as said John Russell Smith is concerned: Now, therefore,

Be it resolved, That under the circumstances as above stated we do hereby release said John Russell Smith from any liability whatsoever under said contracts, to this company, and also release any and all possible claims against said John Russell Smith or against said ships covered by said contracts; and

Be it further resolved, That the secretary of this company be instructed to forward to said John Russell Smith a certified copy of the minutes of this meeting.

GLOBE SHIPBUILDING COMPANY,
B. C. COOKE, *Pres.*
(Countersigned) M. MCMAHON, *Secy.*

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[Affidavit]

PROVINCE OF ONTARIO,
City of Fort William:

John Russell Smith, being first duly sworn, hereby deposes and says:

I am John Russell Smith, designated as "Purchaser" in two certain contracts with the Globe Shipbuilding Company, of Superior, Wisconsin, each of said contracts dated June 8th, 1917, and each of said contracts calling for the construction and delivery to me on the part of the Globe Shipbuilding Company of one steel cargo ship, as fully set forth in said contracts, the purchase price of said ships to be the sum of six hundred twenty thousand dollars ($620,000), and payable in the manner and at the times set forth in each of the said contracts above referred to.

That I have never assigned or transferred either of the said contracts or any interest therein, and that I am the full owner of each of said contracts at the present time.

That there are no mortgages, liens, or incumbrances or brokers' claims, or any claims whatsoever, against either or both of said boats, or either of or both of said contracts.

That I am attaching hereto a certified copy of the minutes of the directors' meeting of the Globe Shipbuilding Company, releasing any claim of said shipbuilding company against said ships or said contracts.

That the cost of each of said ships to me, as fully set forth in said contracts, was the sum of six hundred twenty thousand dollars ($620,000).

That under the terms of said contract covering the first ship, being hull *No. 103* of the Globe Shipbuilding Company the first payment I was to make, as is fully shown in said contract, was on September 1st, 1917, the sum of one hundred thousand dollars ($100,000).

That under the terms of said second contract, covering hull *No. 104*, of the Globe Shipbuilding Company, the first payment I was to make was on November 1st, 1917, the sum of one hundred thousand dollars ($100,000).

That I was ready, willing, and able at above-mentioned dates to make said payments as above set forth, having at the time transferred from Canada to the American Exchange Bank of Superior the sum of two hundred thousand dollars ($200,000) to meet these payments, but that during the month of August I was notified by the Globe Shipbuilding Company that both of these contracts had been requisitioned by the Emergency Fleet Corporation of the United States Government, and that they had been instructed not to receive any money from myself, the original purchaser;

consequently I have not been able to make these payments or any other payments succeeding same, although I have always been able and more than willing to comply fully with the terms of my contracts.

That just as soon as I was notified of the requisitioning of these contracts I immediately took the matter up with the Globe Shipbuilding Company to see if they would build me two other ships in place of the ones taken over. They notified me that under instructions from the Emergency Fleet Corporation they could not take any contracts for private parties. I found the same state of affairs to be true in other American yards. Thereafter I made repeated efforts to secure as favorable contracts with the Canadian yards, but found them full of work and none of them willing to quote any such prices as I had obtained under the requisitioned contracts above mentioned. The best price I was able to obtain, even for deliveries after the war, was the sum of seven hundred fifty thousand dollars ($750,000) per boat. I am the owner of several other boats and had immediate use for these boats, *Nos. 103–104*, in my own business of carrying grains and other commodities from my warehouses in Fort William to the lower lake ports and had arrangements made for return cargoes from the lower lake ports to the head of the lakes and Canadian ports.

On account of the fact that many of the lake boats have been taken off from the lake runs and requisitioned by the Emergency Fleet Corporation for ocean transportation, I am going to be seriously handicapped in handling my business for the coming year and for the period thereafter. I was depending absolutely on the delivery of these steamers, *Nos. 103–104*, for this very purpose. I am, therefore, going to be materially damaged, as can readily be seen, on account of the requisitioning of my contracts. This damage I am ready to present at any time to the Emergency Fleet Corporation whenever I am called upon to do so. In addition, I respectfully submit that I am justly and fairly entitled to the difference between the price of my contracts with the Globe Shipbuilding Company on *Nos. 103–104*, namely, six hundred twenty thousand dollars ($620,000) per boat, and the lowest price I have been able to get a quotation on for delivery after the war, namely, seven hundred fifty thousand dollars ($750,000), or a difference of one hundred thirty thousand dollars ($130,000) per boat. I am reliably informed that the Emergency Fleet Corporation itself has taken over contracts, some of which are at a higher figure than seven hundred fifty thousand dollars ($750,000), and that they have let contracts in the immediate neighborhood

for seven hundred fifty thousand dollars ($750,000) for delivery long after the deliveries which I had in my contracts with the Globe Shipbuilding Company. The delivery of boats counts for everything in this period, where tonnage is so scarce, and it is so vital to have spot tonnage to control.

In connection with the placing of these contracts I made several trips to Superior and spent considerable time in negotiating with the Globe Shipbuilding Company for same. My estimated expenses in this connection are $3,000.

All of which is respectfully submitted.

XX. On February 18, 1920, Mr. E. M. Weaver, chairman of the requisition claims committee of the United States Shipping Board, wrote the following letter to plaintiff:

"Hulls *103* and *104*, Globe Shipbuilding Co.

"DEAR SIR: This will advise you that your claim as former owner of the above-mentioned hulls which were requisitioned by the Emergency Fleet Corporation on Aug. 3rd, 1917, has been referred to the requisition claims committee for consideration and adjustment.

"It is the desire of the committee to proceed to an adjustment of this claim at the earliest possible moment, and it has accordingly designated Wednesday, Feb. 25th, as the date upon which it will be taken up for consideration. You are accordingly invited to appear before the committee at 10.30 a. m. on that date for the purpose of presenting such oral testimony or data as you might desire to have considered bearing on your claim. The committee meets at its offices in room 504, Shipping Board Building, 1319 F Street NW., this city.

"Will you kindly indicate your wishes in this matter at your earliest convenience, and if you desire to appear and the above-named date is not convenient, if you will kindly suggest a time shortly thereafter, such as would be agreeable, the committee will make every endeavor to meet your desire in the matter consistent with its desire to make an early adjustment of the claim."

And on March 1, 1920, Mr. T. T. Underwood, secretary requisition claims committee, United States Shipping Board, wrote the following letter:

"Mr. J. L. DAVIDSON,
c/o Davidson & Smith, Fort William, Ontario.

"Claim re hulls *103* and *104*, Globe Shipbuilding Company.

"DEAR SIR: Your telegram of the 25th ultimo in connection with the above claim, stating that your partner, Mr.

Smith, would not return from his South American trip for about six weeks, was immediately brought to the attention of the requisition claims committee.

"I am now directed to advise you that the committee feels it has sufficient data in the files before it to proceed to a disposition of this claim and to submit its recommended award to the United States Shipping Board for its final approval.

"Under present procedure, when the committee submits its reports to the Shipping Board, the secretary of the board forwards a copy thereof to the claimants and opportunity is thereafter afforded for the presentation of oral testimony or argument before final disposition of the matter. In view of this, therefore, the committee will proceed with the consideration of this claim, and you will be advised of its recommendation in due course, as above stated."

XXI. On November 14, 1922, the Shipping Board disallowed plaintiff's claim for just compensation.

XXII. On March 9, 1923, Mr. F. H. Keefer, then attorney for plaintiff, wrote to Mr. Chauncey Parker, general counsel, United States Shipping Board, as follows:

"I have a letter from the claimant herein asking me to press on now, this claim. You will find by reference to the correspondence, that in view of the pending claims, then made by the Norwegians, it was thought to be of convenience not to have this claim pressed then, and the matter was allowed to stand in abeyance. Reference to correspondence between Mr. Smythe and myself (his letter to me of the 24th of April, 1922, and my reply to him of the 30th of April) will indicate the above.

"I understand that these Norwegian claims have now been adjusted, and there is no reason now why this claim should not be dealt with on its merits.

"The claim, in the judgment of the writer, is one that should be settled between counsel, if possible, and if it can not be settled in that way, the simplest and fairest procedure would be to have same referred to the International Joint Commission. I believe that the Norwegian claims were disposed of by The Haig Tribunal, but Canada and the United States fortunately having a Haig Tribunal of their own, three appointees of each country forming the International Joint Commission. Any matter when in dispute may be referred by the Government of either country to this commission, and this claim, in case we can not adjust it,

is a very proper one to be so referred for settlement. But I think that this claim is one that could be reasonably adjusted between your department and myself. The facts are simply these:

"Mr. Smith had contracts for two ships, hulls numbers *103* and *104*, Globe Shipbuilding Company, of Superior, Wisconsin, dated August, 1917. Material was ordered amounting to between $235,000 and $236,000, and suddenly a notice commandeering the contracts came to the shipbuilding company and to Mr. Smith. The United States Government, through its board, took over these contracts. The Government built the two ships pursuant to the contract, and at the same time built four other ships of the same type, same tonnage, and in the same yard, at a considerably higher price per ton, it thereby getting the benefit of Mr. Smith's former lower price per ton. Mr. Smith's price per ton was $620,000 for each ship, or $117 per ton. The four other ships built at the same time, in the same yard, and of the same type was $810,000 for each ship, or $234 per ton. Therefore, your Government profited by these contracts on these ships to the extent of $190,000 on each ship, or $380,000 on the two. Mr. Smith lost this $380,000 or more. One complete charter would have practically paid the price for each ship at that time.

"Mr. Smith did all he could to further your Government as requested by them during the progress of construction, and, of course, he would have done so as the subject of a friendly nation, and particularly to an ally then at war. He suffered a great loss, because had he these ships they would be very valuable as was, no doubt, threshed out in the Norwegian claims. All that is being asked of your Government is the benefit or saving that it has received by taking over these contracts of Mr. Smith's and which is but fair and right should be paid to him. It was his loss; it was your Government's gain.

"Now that these Norwegian claims are out of the way, I would respectfully urge an early clean-up of this matter. This claim is, as far as I know, the only Canadian claim. I am prepared to go to Washington, if it is desired, at any time, for conference in the matter. The time is running by, and I do not want to let the claim lapse by any principle of limitation, and have merely held same back so far believing such would be of convenience to your Government up to date, on account of other claims being made that might affect this one.

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"Would you be good enough to let me have an early reply on the following two points:

"1. Can we adjust the matter by direct negotiation?

"2. If liability is disclaimed will your Government, upon the application of the Government of the Dominion of Canada, consent to this matter being referred to the International Joint Commission of the United States and Canada?"

On April 4, 1923, Mr. Chauncey Parker, general counsel, United States Shipping Board, wrote to Frank H. Keefer, attorney for the claimant, as follows:

[Copy]

"UNITED STATES SHIPPING BOARD,
Washington, April 4, 1923.

"FRANK H. KEEFER, Esq.,
"Apartment 1, Bank Street Chambers, Ottawa, Canada.

"DEAR SIR: Your letter of March 29th, 1923, is received. Senator Lenroot's secretary called me on the telephone and I told him what it appears he informed you and that was that the question involved in your case was about to be decided by the Court of Claims. The name of the case is Brooks Scanlon Corporation *vs.* United States of America.

"Your claim is not the only one that has arisen from the Government's policy of requisitioning under construction in August, 1917. Under the act of 1917, pursuant to which the requisition was made, the Shipping Board was required to make just compensation to the person whose property was requisitioned. In a large number of cases such compensation has been made on the basis of paying for the materials actually taken, paying also such cost and expense as the owner had incurred through the shipbuilder for the construction of the ship and refunding the owner for the money actually paid to the shipbuilder. A great many people have accepted these settlements and there are not so many cases undetermined, but the Shipping Board has never allowed compensation on the basis of taking the contract because it is our view that such contract was never taken under requisition. This course, however, was not followed in the Norwegian arbitration, as you know. The question will have to be decided in the Brooks Scanlon case and when that case is decided we will have the benefit of their view and the Shipping Board will no doubt give further consideration to the principles which should govern this matter after such decision is made.

"I note what you say with reference to the International Joint Commission. Personally, I see no reason why that tribunal should be resorted to."

XXIII. A restatement of said claim was filed with the Shipping Board under date of August 5, 1925, and thereafter no further action was taken thereon.

XXIV. Just compensation to the plaintiff for his rights and contract which were expropriated by the Government, being the sum that will put him in as good position pecuniarily as he would have been in if his property had not been taken, and fixed as of the date of taking, August 3, 1917, is the sum of $35,000 with interest.

The court decided that plaintiff was entitled to recover $35,000.00, with interest.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff possessed two shipbuilding contracts entered into by the Globe Shipbuilding Company, of Superior, Wisconsin, on June 8, 1917. The contracts called for the construction of two steel cargo vessels of 3,500 tons deadweight capacity, and were to cost $620,000.00 each. One vessel was to be delivered on November 30, 1918, and the other on October 15, 1919.

On August 3, 1917, the contracts were requisitioned by the United States Shipping Board Emergency Fleet Corporation in pursuance of the act of June 15, 1917. The plaintiff has not received any compensation as provided for in the statute.

The case is governed upon its merits by the decision of the Supreme Court in *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106. The right of recovery is alone contested upon the single issue of the statute of limitations. Section 156 of the Judicial Code provides that "Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, * * * within six years after the claim first accrues." The act of June 15, 1917, 40 Stat. 182, 183, provides in section (e) that—

"Whenever the United States shall cancel, modify, suspend, or requisition any contract, make use of, assume,

occupy, requisition, acquire, or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

Subsequently the foregoing provision was repealed by the Merchant Marine Act, 1920, 41 Stat. 988, 989, section 2 (a), subject to the following provision:

"(c) As soon as practicable after the passage of this act the board shall adjust, settle, and liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President by any such act or parts of act; and for this purpose the board, instead of the President, shall have and exercise any of such powers and duties relating to the determination and payment of just compensation: *Provided*, That any person dissatisfied with any decision of the board shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the acts hereby repealed."

The plaintiff was advised on September 19, 1917, by the Fleet Corporation of the requisitioning of his contracts, and requested to "as soon as possible" supply the corporation with a detailed statement of expenditures, etc., it being the stated purpose of the officer sending the letter to reimburse the plaintiff, so far as available funds would permit, following an investigation of the data so furnished. A voluminous correspondence passed between the Fleet Corporation and the contractor, in which reference is frequently made to the plaintiff. The first positive statement bearing upon compensation emanated from the plaintiff on February 9, 1918, in a letter of inquiry addressed to the corporation seeking a fixed time for the adjustment of reimburse-

ment for loss occasioned by the requisition order. A response to this communication is set forth in two letters from the corporation, one dated February 18, 1918, and the other March 27, 1918. Both letters point out the method of preferring claims and the last one enters into detail. On April 17, 1918, the plaintiff complied and returned the data set forth in the two foregoing letters, and nothing further seems to have been done by the Fleet Corporation until February 18, 1920, over two years later, when the corporation again advised the plaintiff that his claim had been referred to "requisition claims committee for consideration and adjustment," and extended an invitation to the plaintiff to appear before the committee in person. On March 1, 1920, the plaintiff is advised that his presence is not essential and that the committee will proceed to an award and submit the same to the Shipping Board for approval. Additional correspondence pro and con followed, plaintiff's attorney asserting that the claim had been considered by the requisition claims committee and thereafter, on November 14, 1922, disallowed. Further correspondence between the parties in 1923 points out the fact that the Shipping Board is awaiting the decision of the Court of Claims in the *Brooks-Scanlon Corporation case*, *supra*, and that when the case is decided the board would have the benefit of the same. The case was decided, and notwithstanding the decision the board did not make the plaintiff an allowance. Hence this suit filed November 25, 1925. It is, of course, apparent that if the plaintiff's cause of action arose upon the date of the requisition order, this suit is barred by limitation.

The act of June 15, 1917, a war measure, granted an extraordinary power; the statute authorized a proceeding affecting the property of a vast number of citizens under circumstances of an acute emergency. The property requisitioned had to be paid for and Congress clearly recognized the injustice of a summary taking without affording the injured party a just degree of relief aside from the right to sue for compensation in the courts. Congress was thereby saying to a claimant, we offer you an opportunity to avoid

litigation and obtain relatively immediate relief; in fact, litigation is to be discouraged, and a method provided by which a just settlement may be brought about, without closing the doors of the courts if unsatisfactory. It is not to be presumed that under the act an unjust or unremunerative compensation would be fixed; on the contrary, many claimants accepted the award and litigation was to an appreciable extent avoided. The method prescribed by the act imposed an affirmative duty upon the President or those to whom he delegated his authority. The machinery established to effectually carry the relief into operation was a written statement of the fact of requisition and a notice to the owner to present data disclosing the amount of his loss and the compensation demanded. This was followed by investigation and subsequently an award or denial of relief. With respect to the requisition of contracts, a controversy arose, the defendant contending that the requisition order took over the ships and not the contracts to construct the same. A positive refusal to pay on any other basis obtained, and it was not until the decision of the Supreme Court in the *Brooks-Scanlon Corporation case* that this issue was finally determined. This case was decided on May 12, 1924, and from that date forward there was no obstacle in the way allowing this plaintiff just compensation for the taking of his contracts. A letter written to plaintiff's attorney in 1923, subsequent to the disallowance of plaintiff's claim in 1922, discloses the fact that the Shipping Board was awaiting this decision and fully realized its importance to claimants. The act of 1920 extended the provisions of the act of June 15, 1917, gave the board ample authority to fix just compensation, and was clearly intended to continue the relief offered to claimants by the act of June 15, 1917.

The acts of 1917 and 1920, we think, established a method of settling this class of claims; they provided a remedy and conferred a right upon the claimant to exhaust the remedy, and this the plaintiff did in this case. The claim was prosecuted as the board directed; the delays are not to be attributed to the plaintiff for it was the duty of the board to fix his compensation or deny it, and this was not done until late in 1922. In the case of *Curtis* v. *United States*, 65 C.

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Cls. 186, the board paid the plaintiff $14,726.25 on December 31, 1926, for land taken August 7, 1918, and in this same case paid for another interest in the land $1,955.63 on April 11, 1927, both payments having been delayed because of pending controversy over just compensation. In the case of the *City of Cape May* v. *United States*, 64 C. Cls. 407, the property was taken December 2, 1918, and award made September 8, 1921, but no part of it paid by the defendant, notwithstanding demand for 75% thereof, a demand repeated in 1925, and no point was made that the plaintiff was not within the statute of limitations.

Chief Justice Campbell, in the case of *New River Collieries Co.*, 65 C. Cls. 205, 233, said:

"These acts provide a method and procedure whereby the Government may be made to respond. It has been held that if the Government attaches purely formal conditions to its consent to be sued these conditions must be complied with and the words being in the statutes 'they mark the conditions of the claimant's right.'"

The Supreme Court in the *Houston Coal Co. case*, 262 U. S. 361, 365, in discussing the 10th section of the Lever Act, a statute granting relief upon the same terms as the act of June 15, 1917, used this language:

"The Lever Act was passed in view of the constitutional provision inhibiting the taking of private property for public use without just compensation. It vested the President with extraordinary powers over the property of individuals which might be exercised through an agent at any place within the confines of the Union with many consequent hardships. As heretofore pointed out, *United States* v. *Pfitsch*, 256 U. S. 547, by deliberate purpose the different sections of the act provide varying remedies for owners—some in the district courts and some in the Court of Claims. It reasonably may be assumed that Congress intended the remedy provided by each section should be adequate fairly to meet the exigencies consequent upon contemplated action thereunder and thus afford complete protection to the rights of owners."

In this case, as previously observed, the Government did not at any time fix or decline to fix, notwithstanding continuing appeals to act, the amount of compensation justly due the plaintiff. On the contrary, it was the Government's act

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which delayed the presentation of a suit; it was the consumption of time by the Government to consider the merits of the claim, and determine what to do, that suspended action and continued with the plaintiff a possibility of escaping litigation and payment of his claim. Surely it may not be disputed that the Government might lawfully have awarded this plaintiff just compensation in 1922 or 1925. It has long since been held by the Supreme Court that where Congress by an act extends to claimants against the Government a statutory remedy the pursuit of the statutory method is essential before resort to the courts. *United States* v. *Taylor*, 104 U. S. 216; *United States* v. *Cooper*, 120 U. S. 124; *Rock Island Railroad Co.* v. *United States*, 254 U. S. 141, 143.

The fact must not be overlooked that claims of the character here in suit were numerous and involved, not alone from the standpoint of fact but also with relation to their legal aspect. It was not until 1924 that the legal principles forming a basis for just compensation were finally settled, and inasmuch as the statutes intended relief and fixed a jurisdiction which might be invoked under the conditions of the statute, we are of the opinion that where the delay in action is to be attributable wholly to the act of the Government, in the consideration of the claim, the plaintiff may invoke the jurisdiction of the court within the statutory period, following the final judgment of the Shipping Board. The act of 1920 confirms this view. Congress employs these words: "As soon as practicable after the passage of this act, the board shall adjust, settle, and liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President by any such act or parts of acts," a decisive recognition of the necessity of granting time for the consideration of cases of this sort, and an unwillingness to circumscribe the period within which the board should act.

This case is governed by the decision of this court in the *Luckenbach case*, 64 C. Cls. 59. The findings, the verity of which admit of no contradiction, disclose that what the plaintiff possessed on the date of requisition were two executory contracts for the construction of two vessels of the de-

scribed tonnage and design. The plaintiff had paid no part of the considerations and absolutely nothing had been done by the contractor towards their construction. Both contracts were executed during the war period and both were requisitioned within about two months after they were signed. The proof shows that the plaintiff had incurred an expense of $3,000 incidental to the procurement of the contracts, and this is the single item of out-of-pocket damage. The vessels to be constructed were not of unusual tonnage or design, nor the consideration for their building abnormally large. As this court said in the *Luckenbach case* (*supra*):

"We need not advert to a condition which everybody knows. However, one must have something to sell, for we may not close our eyes to the fact that a purchaser of a ship-construction contract on August 3, 1917, would look to the situation respecting the contract to be purchased and take into consideration the value of the contract under existing conditions. The Supreme Court in the *Brooks-Scanlon case* enumerates with precision some of the factors going into the value and points out the factors a prudent purchaser would notice and observe before investing. Obviously a purchaser would be willing to pay more for a vessel partly or nearly completed than for one which existed on paper alone. What the owner had to sell in this case was an executory contract, a right which existed on paper, the performance of which depended absolutely upon contemporaneous and future conditions. We do not mean to say that the right and property of the owners were valueless. They did possess a substantial value. The Supreme Court, in the *Brooks-Scanlon case*, in pointing out certain express factors among others to be recognized in ascertaining just compensation for the expropriation of that right and property, justly recognizes that the contract right is not to be measured by the terms of the contract itself and the benefits therein conferred upon the owner but by all this and the state of affairs existing at the time of expropriation, which in the very nature of things must inevitably affect the procurement of that right."

In the *Brooks-Scanlon Corporation case* (*supra*) the Supreme Court pointed out certain factors entering into just compensation in a case of this character, as follows:

"The value of such ships at the time of requisition, and the then probable value of the time fixed for delivery, the contract price, the payments made and to be made, the time

to elapse before completion and delivery, the possibility that by reason of the Government's action in control of materials, etc., the contractor might not be able to complete the ship at the date fixed for performance, the loss of use of money to be sustained, the amount of other expenditures to be made between the time of requisition and delivery, together with other pertinent facts, are to be taken into account and given proper weight to determine the amount claimant lost by the taking. (*Minnesota Rate Cases*, *supra*, 451; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76; *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195; *Monongahela Navigation Co.* v. *United States*, *supra*, 343), that is, the sum which will put it in as good a position pecuniarily as it would have been in if its property had not been taken. *United States* v. *New River Collieries Co.*, *supra*, 343; *Seaboard Air Line Ry. Co.* v. *United States*, *supra*, 305." (265 U. S. 126.)

The record herein precludes resort to many of the enumerated factors mentioned in the above quotation. Doubtless the plaintiff might have negotiated his contracts, for contracts were sold. The difficulty we encounter is the necessity of discriminating in cases where executory contracts exist and stand alone without additional facts to aid in fixing compensation. The possibility of the contractor complying with the contracts, as per their terms, is obvious; it could not have been accomplished. So that what the plaintiff had was two executory contracts to construct the vessels when the obstacles to performance were removed and performance possible. The loss of the plaintiff under all the circumstances of the case was minimized to practically a nominal amount. It is, we think, apparent that the plaintiff's contracts, if offered for sale in the prevailing market, would have elicited prices largely less than in the cases disclosing a progress toward completion, with materials available to complete and prospects of procuring a completed vessel more propitious. Considering the case in all its aspects and in view of the findings made, we think a judgment for $35,000 is fully compensatory. Judgment will be awarded the plaintiff for $35,000 and interest thereon at the rate of 6% per annum from August 3, 1917, until paid. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

ARROWHEAD SPRINGS CO. v. THE UNITED STATES

[No. F-363. Decided March 11, 1929]

On the Proofs

Lease; damage by fire; absence of negligence.—Where the lessee is obligated to replace all property "in the same shape and condition as at the time" possession was taken, "ordinary wear and tear and damage by fire or other casualty excepted," he may not be held responsible in damages by reason of fire where no negligence appears.

The Reporter's statement of the case:

Mr. Leslie C. Garnett for the plaintiff. *Messrs. C. Bascomb Slemp* and *John W. Price*, and *McAdoo, Neblett, O'Connor & Clagett* were on the brief.

Mr. Edwin S. McCrary, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Arrowhead Springs Company, is a corporation organized and existing under and by virtue of the laws of the State of Maine, with its principal office at the Arrowhead Springs Hotel, San Bernardino, California.

II. Plaintiff on February 23, 1920, executed a lease to the United States, leasing "all that certain property consisting of 1,800 acres more or less, situated in the Angeles Forest Reservation, San Bernardino County, State of California, including all buildings, machinery, and equipment belonging to the Arrowhead Springs Company and the Arrowhead Springs Hotel," the said contract of lease being in the following words and figures, to wit:

FEBRUARY 9, 1920.

Mr. SETH MARSHALL,
President Arrowhead Springs Company and Arrowhead Springs Hotel, San Bernardino, Cal.

SIR: Pursuant to the authority contained in the act of Congress approved March 3, 1919, your proposal of Novem-

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ber 28, 1919, with reference to that property known as the Arrowhead Springs Company and the Arrowhead Springs Hotel, to wit—

All that certain property consisting of eighteen hundred (1,800) acres, more or less, situate in the Angeles National Forest Reserve, San Bernardino County, State of California, including all buildings, machinery, and equipment belonging to the Arrowhead Springs Company and the Arrowhead Hotel—

is hereby accepted, subject to the following conditions:

1. That the property hereby rented shall include all lands, buildings, improvements, equipment, machinery, implements, fixtures, and the furniture, furnishings, floor coverings, utensils, crockery, silverware, bedding, draperies, and other contents now in such buildings or elsewhere upon said property as enumerated in the schedule to be prepared by you, checked by a representative of the Public Health Service, and made a part hereof;

2. That you shall cause to be promptly executed such work as the department may require to fit the property for Government use;

3. That you will warrant and defend to the lessee, its officers and agents, the quiet and peaceable possession and occupancy of the aforesaid premises, and in case of any disturbances, by suit or otherwise, will defend the same free of charge to the Government in or before the proper State or United States Courts;

4. That the term of occupancy shall be from the date the department takes possession of the property until June 30, 1920: *Provided*, That the Government shall have the right to renew this agreement and retain possession of said property for the fiscal year beginning July 1, 1920, and ending June 30, 1921, and for each successive fiscal year thereafter until June 30, 1924, and this agreement shall be considered as being renewed each successive fiscal year after June 30, 1920, unless the Government shall express its intention to surrender possession of said property by written notice served not less than six (6) months prior to the end of any fiscal year as specified;

5. That all buildings and other improvements fixed to or erected or placed in or upon the said premises by the lessee shall be and remain in exclusive property of the lessee: *Provided, however*, That the same, unless sold or otherwise disposed of, shall be removed by the lessee within 10 days after the said premises are vacated under the lease;

6. That if any of the buildings on said premises shall be destroyed by fire or other casualty, or shall from any cause

not the fault of the United States become untenantable or unfit for occupancy, in the judgment of the Surgeon General of the Public Health Service, you shall rebuild or repair the same as soon as practicable if required by the Treasury Department so to do, and the rent of such premises or such part thereof as shall be so rendered untenantable or a proportionate part of such rent shall cease and remain suspended and abated for the whole period during which the occupancy thereof shall be prevented by such casualty or cause, or in such event this agreement may be canceled at the option of the department;

7. That the rent to be paid you by the United States for such use and occupancy of said property, etc., shall be (a) at the rate of $62,500.00 per year, payable in monthly installments of $5,208.33 each (provided that, if purchase is consummated prior to June 30, 1921, you shall rebate to the Government one-fifth of the amount of rental paid), and (b) reimbursement of the actual cost of the work mentioned in condition 2 above, and (c) of the actual cost of replacing the property in the same shape and condition as at the time the Government took possession, ordinary wear and tear excepted; provided, that the extent of restoration shall be determined and such costs shall be ascertained by the Surgeon General, whose decision shall be binding upon both parties hereto; provided, also, that the Government shall not be liable for any rent (under subdivision (a) above) during such time as such restoration may continue after the date the Government vacates said property;

8. That the United States shall pay for all gas and electricity used during its occupancy of the premises;

9. That the United States will not suffer or commit any damage to the premises, buildings, fixtures, or furnishings; and that upon the termination of this occupancy the United States shall replace all of said property in the same shape and condition as at the time the Government took possession thereof, ordinary wear and tear and damage by fire or other casualty excepted;

10. That the United States will not incur any debt or create any charge against said property for work done, or material furnished, for which you could become liable or which might be attached as a lien upon the property hereby leased;

11. That the United States shall without prejudice have the exclusive right at any time during the period of this lease or during any fiscal year within which this lease is actually renewed, as provided in condition 4 above, to purchase the herein-described property for a sum to be mutually

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agreed upon, not exceeding seven hundred fifty thousand dollars ($750,000.00); and it is hereby further agreed that the Government will concede for the exclusive use of the bottling plant of the Arrowhead Springs Company now situated in the city of Los Angeles, California, not to exceed two (2) inches of cold water and two (2) inches of hot water from the springs upon said property, and the right to maintain and repair the present pipe lines and reservoirs or if necessary to construct new lines or reservoirs in order to utilize said waters for use in said bottling plant; and the property and equipment of said bottling plant is hereby specifically excepted and excluded from the purchase price as above stated in the event that purchase of the property herein mentioned is consummated.

12. That no Member of or Delegate to Congress, or Resident Commissioner shall be admitted to any share or part in this agreement, or to any benefit to arise therefrom; and

That you shall retain the original of this acceptance and write upon the accompanying copy hereof, date and sign, your unqualified assent to all of its terms and conditions, and deliver such assent to this department.

Respectfully,

(Signed) J. H. MOYLE,
Assistant Secretary.

III. Under the provisions of the lease incorporated in Finding II hereof, the Arrowhead Springs Hotel, 110 rooms, and the property covered by said lease, were first used by the United States Public Health authorities for hospital purposes and afterwards by the United States Veterans' Bureau for similar purposes. On August 1, 1923, the Director General of the Veterans' Bureau notified the plaintiff that in accordance with the terms of the lease the contract would be canceled and the premises vacated on June 30, 1924. A copy of this notice is attached to the petition as Exhibit "A" and is made a part of this finding by reference. The plaintiff receipted to the defendant for the premises on the 27th day of August, 1924, although the defendant actually remained in continuous and exclusive possession thereof until the second day of September, 1924. A copy of said receipt is attached to the petition as Exhibit "B" and is made a part of this finding by reference.

IV. During the tenancy of the defendant it had made many changes in the property leased; and the buildings,

grounds, furniture, fixtures, and equipment of the hotel property were greatly damaged beyond ordinary wear and tear. Upon the termination of its occupancy the United States refused to restore the plaintiff's property in the same shape and condition as at the time the Government took possession, as provided for by paragraph 9 of the lease of February 9, 1920, but negotiated with the plaintiff for a settlement of the damages to said property. During the progress of the negotiations for the settlement of the claim for damages to the plaintiff's property the plaintiff had the premises and the fixtures and equipment examined by various experts and, based upon their figures, plaintiff estimated the cost of restoration of the buildings and grounds at $58,326.00. The United States Veterans' Bureau estimated the costs of such restoration to be $24,638.25; and on August 1, 1924, the plaintiff, by Seth Marshall, its president, agreed to accept the estimate of the United States Veterans' Bureau of $24,638.25 in payment of the damages to the buildings and grounds and agreed to pay $5,000.00 to the United States for the Government buildings and equipment then on the ground. A copy of this agreement is attached to the petition and marked Exhibit " C " and is made a part of this finding by reference. On December 4, 1924, the Director General of the United States Veterans' Bureau transmitted to the Comptroller General of the United States for settlement the agreed claim in the sum of $24,638.25, less $5,000.00, to wit, $19,638.25. A copy of the letter of transmittal from the Director General of the Veterans' Bureau to the Comptroller General is attached to the petition as Exhibit " D " and is made a part of this finding by reference. On February 4, 1925, the Comptroller General of the United States disallowed and refused to pay the agreed claim of $19,638.25 on two grounds—first, that the Surgeon General had not determined the extent or cost of the restoration, and, second, that since the Veterans' Bureau did not contemplate actual restoration of the premises, such restoration by the plaintiff was a condition precedent to reimbursement for restoration. A copy of the letter disallowing the said agreed claim is attached to the petition and marked Exhibit " E " and is made a part of this finding by reference.

V. Subsequent to the decision of the Comptroller General the plaintiff undertook the restoration of its property, buildings and grounds, furniture and equipment. Upon the completion of its work on the property the plaintiff filed with the Surgeon General of the United States a claim; but the Surgeon General on November 15, 1925, advised the plaintiff that since the passage of the act of Congress transferring all matters pertaining to the veterans to the United States Veterans' Bureau, it was the position of the Director General of the Veterans' Bureau, in which he concurred, that the Surgeon General had no jurisdiction over things of this character and therefore refused to consider the claim. The plaintiff thereupon applied to the Director General of the United States Veterans' Bureau for a consideration of its claim, but the said Director General of the Veterans' Bureau declined and refused to consider the claim on the ground that the whole matter was before the Comptroller General of the United States for settlement and that he was without jurisdiction to consider the said claim. Thereupon plaintiff made application to the Comptroller General for a settlement, but the Comptroller General, January 25, 1926, held that while the expenditures for the actual restoration of the property might be considered as "furnishing support for the claim as originally submitted by the Director under date of September 4, 1924, it may not be accepted to reopen the matter so as to set aside the determination duly made by the Director of the Veterans' Bureau pursuant to the lease provision," and the acceptance by plaintiff of such determination and the amount thereof, to wit, $24,638.25, less $5,000.00, or, to wit, $19,638.25, and thereupon refused to consider or pay the claim of the plaintiff, but certified that there was due the petitioner the sum of $19,638.25 in settlement of the estimated claim for damages to the buildings and grounds. A copy of the comptroller's decision is attached to the petition as Exhibit "F" and is made a part of this finding by reference.

VI. In order to arrive at a settlement with the Government for the damage to the furniture, fixtures, and equipment, the plaintiff, soon after the occupancy of the property

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by the Government was terminated, inventoried said furniture, fixtures, and equipment, and estimated the damage thereto at $15,434.67, and filed its claim based upon such estimated damages. Two inventories of the furniture, fixtures, and equipment of the plaintiff's property were made by agents of the United States Veterans' Bureau, one by Captain Jordan, who estimated the damages at about $15,-000.00, and a later one by Captain Feltham, who estimated the value of the missing articles at $1,338.26 and the cost of repairs and restoration of the rest of the furniture at $93.00. The Director General of the Veterans' Bureau recommended to the Comptroller General the payment of the estimate of Captain Feltham of $93.00 for the restoration of the furniture, fixtures, and equipment, and $1,338.26 as the value of the missing articles. On December 5, 1925, the Comptroller General approved the said recommendation of the Director of the Veterans' Bureau, that an allowance of $93.00 for the restoration of furniture, fixtures, and equipment of the hotel, and $1,338.26 as the value of the missing articles, be paid. After the said decision and disallowance of the Comptroller General of February 4, 1925, holding that restoration of the property was a condition precedent to reimbursement, the plaintiff restored the furniture and fixtures and replaced the missing articles, and duly filed with the Surgeon General a claim of $27,730.41 as the actual restoration costs of furniture, fixtures, and equipment. As aforesaid, said Surgeon General refused to consider the claims on the ground that he was without jurisdiction, and the United States Veterans' Bureau likewise refused to consider the claim for the actual restoration cost of the property on the ground that that bureau was without jurisdiction to consider the same, and thereafter, by the decision of January 25, 1926, the Comptroller General refused to consider this claim.

VII. The property in suit herein consists of a 110-room hotel and health resort with bath and spring houses, bungalows, and outbuildings, and 1,800 acres of land, some of which is mountainous and some of which is comparatively level. It is located approximately seven miles from the heart of the city of San Bernardino, California, and about

fifty miles from the city of Los Angeles. The main hotel building was erected during the years of 1904–1905 at an initial cost of $115,000. Several years after the completion of the building improvements were added to the building at a cost of approximately $20,000. It is a frame structure with exterior stucco, the lower part being of stone rubble.

At the time the Government took possession of the hotel it was equipped to care for a maximum capacity of 135 guests. The dining room and the kitchen were furnished and equipped to enable the serving of 300 persons at one time. The hotel property was operated by the plaintiff as a tourist and health resort hotel of the better class. The furniture and fixtures were kept clean and in good repair. The floors were polished and the lobby and parlor presented an attractive appearance. The first floor of the building was given over, except for office purposes, to the dining room, parlor, rotunda, billiard room, and kitchen. The dining room opened into the lobby and when thrown together made a room approximately 275 feet long and 50 feet wide. The second and third floors of the building were devoted to guests' rooms.

In the rear of the main building were separate bathhouses for men and women, containing hot rooms, cooling rooms, dressing rooms, bathrooms, barber shop, and massage rooms. The bathhouse was in three units—a men's bath department, women's bath department, and the dressing rooms between the two departments. The women's bath department consisted of about 20 tub baths and stalls, hydrotherapy departments, douches and sprays, light cabinets, and rest rooms containing couches, two massage rooms with massage equipment, tables, shelves, the Turkish bath department, two sweat rooms, and the department known as the "mud bath." The men's bathroom was identical with the women's with the exception that it had one massage room and no Turkish bath. There were about 75 dressing rooms provided with lockers.

There were four natural steam cave bathhouses not far distant from the main hotel building, two on the women's side and two on the men's side, consisting of tunnels driven

into the side of the hill into which hot steam collected and a high temperature was secured.

One of the valuable assets of the property was a deposit of mineralized mud surrounding one of the groups of hot springs, known as a mud ciénega, which contained calcium salts and arsenic, and had valuable therapeutic properties.

The hotel contained a laundry, equipped with machinery and drying rooms, which handled all of the laundry for the hotel and the guests. There was also on the property an ice plant which supplied all of the ice that was used at the hotel.

The floors of the main building of the hotel were maple hardwood and were in good condition.

There was a sewage-disposal plant on the property which took care of the hotel sewage.

This property derives its name from the novel or natural design known as an arrowhead, which is outlined on the side of the mountain above the hotel in the shape of an Indian arrowhead. This arrowhead is caused by a growth of gray sage growing in the shape of an arrowhead, and around the fringe of this gray sage growth is a green bush or brush that acts as a fringe and outlines the arrowhead in bold relief. The arrowhead itself is huge in size, being 1,300 feet from top to bottom and 800 feet across, pointing down to the hotel and visible for many miles.

Upon the plaintiff's property are many valuable cold-water springs in addition to the hot springs, and the water from these springs is marketed by the plaintiff company in the city of Los Angeles under the trade-mark of the Indian arrowhead. The plaintiff is a large distributor of bottled drinking water in the city of Los Angeles, and this water is also used in its bottling works in the making of Arrowhead ginger ale and other soft drinks.

The gardens and grounds, consisting of about 120 acres around the hotel, were planted with shrubs and orchard and shade trees. At the time the Government took possession of the property the grounds were kept free of débris, the lawns were well cut and sprinkled regularly, and the shrubs and trees well cultivated and properly irrigated.

VIII. When the Government returned the property to the plaintiff the maple hardwood floors in the lobby contained innumerable burns and numerous scratches and gashes so that the entire floor had to be scraped and sandpapered. The burns had obviously been caused by lighted cigarettes having been thrown upon the floor, and the gashes and cuts had been caused by heavy articles having been moved across the floor. The floor in the dining room was less seriously marred. The walls in the lobby were badly marred and scratched. The several pillars which ran from the floor to the beams on the ceilings above were similarly marred and scratched. The ceiling of the lobby was badly discolored, due to leakages of water from the pipes above. Other spots were caused by the plaster dropping from the lath. Those spots ranged in diameter from six inches to ten or twelve feet, and extended the whole length of the lobby ceiling. The dining-room ceiling also was discolored in spots, and in a number of places the plaster had dropped from the lath. Some of the pillars in that room had been whittled with a sharp instrument, and initials had been cut into them.

The Government had moved the furniture of the hotel out of the rooms in which it had been located and into various outbuildings and warehouses. During the period of the Government's occupancy some of it had been lost and much of the furniture had been broken and defaced. Rockers had been broken on some of the chairs, many of the seats had been broken out, and initials and lines and figures had been cut into the chairs. The rugs in the lobby had been badly burned. Some of them had to be entirely discarded; some of them were partially salvaged.

The women's bathhouse had been dismantled; and by removing the small rooms and booth, the plumbing fixtures, tubs, etc., the Government had converted the bathhouse into a warehouse. The men's department was left practically intact. The walls were badly discolored and required redecorating. The steam caves were not used by the Government and the building was kept closed, so that the vapors in the caves had collected in the building, and a

high degree of decay had developed in the timbers and in the floors and grating. The mud ciénega was full of gravel, sand, lead and iron pipes, chunks of concrete, lath sticks, leaves of trees, and débris of various kinds. The Government had commenced the construction of a building over the mud ciénega but had not finished it. The concrete foundations were left in it. In order to make it usable again the plaintiff found it necessary to remove all of the mud by hand, dry it, and sort it, and in that way eliminate all foreign substances.

Upon acquiring possession of the property the Government had torn down the plaintiff's laundry building and had dismantled its machinery and equipment. Some of it was lost, some of it had been left exposed to the weather, and some of it had been stored in a shed. The Government had constructed a new and larger building and had installed new laundry machinery and equipment. Prior to its evacuation of the property, the Government dismantled the new laundry and sold and removed the equipment. In removing it one side of the building was torn out and the plumbing connections were destroyed. The ice plant and machinery left by the plaintiff had been removed and a smaller plant of insufficient size and capacity had been put in its place. At the time of the return of the property to the plaintiff the ice plant which the Government had installed was inoperative.

Through lack of care and proper irrigation, the trees and shrubbery and gardens in the vicinity of the hotel were greatly damaged during the period of the Government's occupancy. In one of the plaintiff's orchards the Government constructed a number of pigpens and approximately 40 fruit trees in that orchard were uprooted or otherwise destroyed. Many other fruit and shade trees near the hotel and in Waterman Canyon had been destroyed. Others that were left were sickly looking. Quantities of structural timbers, pipe fittings, wire, tin cans, and other débris were left upon the property.

The septic tank used by the hotel had been filled with dirt and abandoned and two tanks with but little septic action were placed above the ground and used as sedimentary tanks.

They were insanitary, ineffective, and had to be removed and replaced at a substantial cost to the plaintiff.

The plaintiff's kitchen equipment was stored under the ground under the building and rusted out. The silver service and other silver was also stored there, as were many of the dishes. The kitchen equipment, however, had become greatly depreciated and was of comparatively little value at the time the Government took possession of the property.

In converting the hotel into a hospital the Government found it necessary to cut into the plumbing system in order that it might install additional basins and other hospital necessaries. Some of the plaintiff's fixtures were removed and lost. The fixtures installed by the Government were detached and removed by the Government at the time of the termination of its tenancy. The plumbing was found to have had many overflows due to stoppage of the pipe line by rags, bandages, and wads of cotton.

The switchboard connection of the telephone system to all of the rooms had been disconnected and the phones had been taken down and stored or lost. The electrical wiring had been changed, new wire had been put in, old wire had been taken out, and all the wiring in the women's bathhouse had been destroyed. Many of the electrical fixtures and connections had disappeared. Wires had been pulled and openings had been plastered over. The plaintiff found it necessary to largely renew both the plumbing and the wiring of its hotel.

A lath house, barn, and feed shed, and a four-room bungalow were destroyed.

A fire occurred while the Government occupied the property. The fire will be hereafter more fully discussed. It burned over between 1,200 and 1,300 acres of land, dried up the cold-water springs and thereby impaired the water supply, greatly disfigured the natural Arrowhead which gives the property its name, and destroyed bridges and vegetation.

The Government occupied the premises from June 30, 1924, to September 2, 1924, without paying any rent for that period.

IX. The plaintiff's claim as set forth in its petition is as follows:

Item			Amount
I. Buildings and ground:			
Plumbing renewals			$13,890.21
Interior painting and decoration			17,462.70
Refinishing floors, main building			569.95
Electric wiring and fixtures			2,354.59
Laundry			2,407.23
Repairing steam cave bathhouses			518.00
Ice plant			4,347.30
			41,549.98
General repairs			34,992.16
Cleaning up grounds, removing débris, etc			1,984.40
Sewage-disposal plant			1,200.00
Mud ciénega			3,000.00
Lath house			735.00
Barn and feed shed			1,250.00
Four-room California bungalow			500.00
Restoration and repair of road			575.00
Restoration of terrain and damage to plantation			11,960.00
			97,746.54
II. Furniture and fixtures:			
Repairing and restoring			27,730.41
Total restoration buildings and grounds, furniture and fixtures			125,476.95
III. Rent:			
Month of July, 1924	$5,208.33		
Month of August, 1924	5,208.33		
Two days of September, 1924	342.46		
			10,759.12
IV. Forest fire:			
Damage			50,000.00
Credit to United States based on allowable wear and tear			18,000.00
Total amount of claim			168,236.07

X. With the exception of the $3,000 claimed as the cost of the restoration of the mud ciénega and the $1,200 claimed as the cost of restoration of the sewage-disposal plant, the actual expenditure of all of the amount here above listed and claimed by the plaintiff under Subdivision I, Buildings and grounds, and Subdivision II, Furniture and fixtures, is supported by vouchers and receipted invoices which have been offered in evidence. The labor on those two excepted items was performed and paid for under a general contract.

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The following items make up the $34,992.16 listed under Subdivision I as general repairs:

Lumber	$1,379.03
Plaster, lath, and putty	657.55
Repairing roof	1,570.53
Brick, reinforcing steel, and cement	749.12
Glass	76.97
Rock and sand	419.50
Sheet-metal work	133.45
Porcelite flooring	72.60
Incinerator stack	47.35
Concrete culverts	15.00
Freight and cartage for material	570.51
Repairs to kitchen	935.36
Carpenters	5,791.90
Painters	8,749.56
Steam fitters	868.25
Masons	221.75
Common labor:	
Cement work, bathhouse, kitchen, ice house, hotel, and miscellaneous exterior repairs	845.85
Dormitory and laundry painting and labor	264.00
General hauling	267.00
Window washing	150.00
Painting bungalows and cleaning up around building	1,206.50
Repairing and cleaning clubhouse and ten small bungalows	447.50
Repairing septic tank and sedimentation-tank sewers and hot-water lines	1,380.00
Hot-water reservoir	520.00
Repairing outbuildings	298.00
Removing septic tanks	44.65
Repairing cold-water reservoirs	104.00
Cleaning out mud from reservoirs, repairing partitions, and repairing retaining walls	308.50
Keys	90.00
Compensation insurance (required by California law)	1,384.39
Contractor's salary	3,817.75
Repairs to machinery	519,09
Repairs to pipe lines	126.65
Miscellaneous machinery repairs	149.88
Miscellaneous building repairs	810.57
	34,992.16

The other items listed under that subdivision are self-explanatory.

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The claim of $27,730.41 carried under Subdivision II as repairing and restoring furniture and fixtures is comprised of the following items:

Item	Amount
Replacing lost furniture and fixtures	$2,002.40
Replacing and laying carpets and rugs	5,113.21
Replacing linen	5,782.50
Repairs to furniture and fixtures	6,653.18
Repairing and replacing kitchen and dining-room furniture	7,378.29
Replacing hardware	321.43
Painting furniture	479.40
	27,730.41

Of the $18,000 credit which the plaintiff concedes to the United States as allowable wear and tear, it allocates $15,000 to its claim for its cost of repairing and restoring furniture and fixtures.

XI. It is contended by the plaintiff that the expenditures made on the property in suit and sought to be recovered in this action were the actual costs of doing nothing more than replacing the property in the same shape and condition as at the time the Government took possession, ordinary wear and tear excepted. Although it is obvious that but for the use made by the Government of the property during the period of its tenancy and the condition in which the property was left by the Government at the termination of its tenancy, the extensive alterations, repairs, and replacements which were made on the property following the termination of that tenancy would not have been necessary. It is apparent from an examination of the evidence in this case that when the plaintiff had completed the work during the latter part of the year 1924 and the early part of the year 1925, which involved expenditures aggregating $125,476.95, referred to in Finding IX hereof, the hotel buildings were generally in a much better condition than at the time the defendant entered upon possession of the leased premises. A substantial part of the expenditures made were for improvements or betterments. The plumbing, which, although in a comparatively good state of repair at the time of the beginning of the occupation of the property by the Government, was even at that time old and subject

to a rapid depreciation by reason of the mineral waters which were used in the hotel, was very largely renewed. Pipe lines were rebuilt and renewed; the buildings were completely painted and redecorated, both inside and out; the buildings were rewired; new laundry equipment and machinery were installed; a new refrigeration plant was installed to take the place of one which at the time of the leasing of the property was antiquated, inefficient, and practically beyond repair; a new sewage-disposal plant was installed; roofs were repaired; and other things of the like nature were done.

XII. At the termination of the Government's tenancy the cost of replacing the plaintiff's buildings and grounds in the same shape and condition as at the time the Government took possession, ordinary wear and tear excepted, would have been $29,382.66, and the cost of replacing the plaintiff's furniture and fixtures in the same shape and condition as at the time the Government took possession, ordinary wear and tear excepted, would have been $11,584.38.

As has been hereinbefore stated, the defendant occupied the leased premises from June 30, 1924, to September 2, 1924, and paid to the plaintiff no rent for the use of the property during that period. The amount of the accrued rent due to the plaintiff and unpaid is $10,759.12.

XIII. The forest fire hereinbefore referred to occurred in October of 1922, starting five or six hundred feet from the garage which adjoined the hotel building. It was first seen between 12 and 12.30 at noon. The fire originated at a spot frequented and resorted to for gambling purposes by the hospital patients. The place, although not far from the main road, was located amongst a dense growth of brush and timber and was thereby quite completely isolated. Four or five patients were seen to go there on the morning of the fire and to return from there just before the lunch hour and within twenty minutes or a half hour prior to the time the fire was first seen. When first discovered the fire was in and among the boxes and leaves which the soldiers had gathered together for the purpose of making places where they might sit and gamble. There were no electric wires or gas pipes in the locality where the fire started. Immediately after the

discovery of the fire the employees of the Government ran the fire truck from the garage and connected the hose and laid out four or five hundred feet of hose in the direction of the fire. This line of hose extended to a point sufficiently near the fire to reach the fire with a stream of water. A coupling in this line became disconnected, or was broken, and a section of hose was supplied from a hose reel near at hand containing canvas hose, which had been seriously damaged by exposure to the weather. This extra hose burst under the pressure of water. By that time the fire was beyond control. The plaintiff contends that the defendant is responsible for the fire loss on two grounds, viz—

1. The fire loss was caused by the negligence of the methods of the hospital and is not excepted in the lease.

2. In any event, the loss resulted from the negligence of the defendant in supplying, operating, and maintaining defective fire hose.

One of the chief assets of the plaintiff is the supply of pure, cold water found in springs on its property at Arrowhead, which is transported to its plant in Los Angeles, where it supplies that city with a great portion of the bottled drinking water consumed there, under the trade name of "Arrowhead," and also maintains a bottling plant there where this water is made into ginger ale and other soft drinks widely advertised and sold under the trade name of "Arrowhead."

As a result of the fire all the cold-water springs being used for commercial purposes ceased to flow, dried up, and disappeared, which necessitated a new water supply at a lower hydrostatic level, or ground-water level. The plaintiff actually spent $10,090.31 in getting this new water supply. Before the fire the greater part of the property was covered with a dense growth of brush from five to eight feet high. In the draws and canyons was a dense growth of timber and underbrush. The timbered portion equaled about 18 or 20 acres. The fire burned over between twelve thousand and thirteen thousand acres of land. The bridges across the trails on the burned-over land had been burned or destroyed by falling timber. The trails were totally obstructed at many places, the draws or canyons washed by the first rain as far

as fifteen or twenty feet across and ten or fifteen feet deep, the banks washed away down into the bed of the stream. The fire consumed the leaf mold or upper soil, leaving the bare rock exposed, so that the run-off from rain following the fire was very rapid, while before it was very slow. The brush has now grown about a foot or a foot and a half, and some of the trees are recovering, but the greater part of the acreage is showing very little sign of growth. The arrowhead which gives the property its name is caused by growth of gray sage fringed with a green bush which outlines the arrowhead. It is thirteen thousand feet from top to bottom and eight hundred feet across at its largest point. The burning off of the brush caused the arrowhead to wash badly, so that great cuts and gashes have come into it.

If the court should find that under the facts as herein developed that the defendant is responsible for the setting of the fire which caused the damage herein complained of, and that the plaintiff is entitled to a recovery therefor, the plaintiff should have judgment for the sum of $50,000.00 as its compensation for the damage to its property resulting from the fire.

The court decided that plaintiff was entitled to recover $51,726.16.

MOSS, *Judge*, delivered the opinion of the court:

The plaintiff, Arrowhead Springs Company, owned and operated the Arrowhead Springs Hotel at San Bernardino, California. On February 23, 1920, plaintiff leased to the Government its entire property consisting of buildings, machinery, and equipment, including 1,800 acres of land situated in the Angeles Forest Reservation, at the rate of $62,500 per annum, payable in monthly installments of $5,208.33. The property was leased to the Government for use as a hospital, and was under the control of the United States Veterans' Bureau. The lease was renewable from year to year at the option of the Government. It contained the following provision: "That the United States will not suffer or permit any damage to the premises, buildings, fixtures, or furnishings; and that upon the termination of this

occupancy, the United States shall *replace all of said property in the same shape and condition* as at the time the Government took possession thereof, ordinary wear and tear, and damage by fire, or other casualty excepted."

The Government remained in the occupancy of said property for a period of more than four years, to wit, until September, 1924.

It is conceded by defendant that during the occupancy of the leased property herein many changes were made in the property; and that the buildings, grounds, furniture, fixtures, and equipment of the hotel property were greatly damaged beyond ordinary wear and tear. At the termination of its occupancy the Government refused to restore the property, and negotiated with plaintiff for a settlement of the damages to said property, failing in which, plaintiff undertook to and did restore same. Plaintiff's claim as set forth in its petition amounted to $97,766.54 for the buildings and grounds and $27,730.41 for restoring and repairing furniture and fixtures, making a total of $125,479.95. There is an undisputed claim of $10,759.12 for rent for the holdover period, and a further claim for damage by fire, which will be separately considered.

The main hotel building was erected in 1904–5 at an initial cost of $115,000. The sum of $20,000 was thereafter expended in improvements on the building. It is a frame building with stucco exterior, the lower part being of stone rubble.

The hotel was operated as a tourist and health resort, and appealed to a very high-class patronage. It was equipped to care for as many as 135 guests, and 300 persons could be served at one time in the dining room. There were bathhouses for both men and women, suitable dressing rooms, rest rooms, massage rooms, and a Turkish-bath department. There were, also, natural-steam bathhouses not far distant from the main building; and surrounding one of the group of hot springs was a deposit of mineralized mud known as a mud ciénega. There was a laundry, an ice plant, and a sewage-disposal plant. The gardens and grounds, consisting of about 120 acres immediately surrounding the hotel, were

planted with shrubs and shade and fruit trees, and at the time the Government took possession the grounds were in excellent condition, and the shrubs and trees were well cultivated, and properly irrigated. (Finding VII.) When the Government returned the property to plaintiff the hardwood floors in the lobby had been injured by burns and scratches to such extent that the entire floor had to be scraped down and sandpapered. The walls in the lobby, as well as the pillars, had been badly marred and scratched. The ceiling was discolored, due to leakage from the pipes above. The plastering had dropped here and there leaving the laths exposed in spots ranging in diameter from six inches to ten or twelve feet. Some of the pillars, both in the lobby and in the dining room, had been whittled, and initials had been cut into them. Much of the hotel furniture had been broken and defaced, and some of it had been lost. Rugs had been burned, some of them to such extent that they had to be entirely discarded. The women's bathhouse had been dismantled and converted into a warehouse. The mud ciénega was filled with gravel, sand, lead and iron pipes, and débris of various kinds, which resulted in its complete destruction for the purpose for which it was intended. The laundry building had been torn down and dismantled. Some of its equipment had been lost, and some of it had been stored in a shed, and greatly injured by exposure to the weather. The Government had constructed and equipped a new and a larger laundry building, which had been dismantled, and the equipment sold and removed prior to the evacuation of the property by the Government. One side of this new laundry building was torn out and the plumbing connections were destroyed. The ice plant left by plaintiff had been removed and another installed by the Government, which, at the time of the return of the property, was inoperative. The trees and shrubbery were greatly damaged through lack of care and proper irrigation. One of the orchards had been used for pigpens, and approximately 40 fruit trees had been destroyed. The septic tank used by the hotel had been filled with dirt, and abandoned, and the Government had constructed two tanks placed above

the ground. They were insanitary and ineffective, and had to be removed. In order to convert the hotel into a hospital the Government found it necessary to make changes in the plumbing system. Some of plaintiff's plumbing fixtures were removed and lost, and the fixtures installed by the Government were removed at the termination of its occupancy. The switchboard connection for telephone service to the various rooms, and the telephone instruments had been removed and stored, or lost. The wiring had been changed and many of the electrical fixtures and connections had disappeared. The plaintiff found it necessary to remove much of the plumbing and wiring of the hotel. A lath house, barn, and a four-room bungalow were destroyed. This is a very brief recital of conditions existing at the time the Government acquired the property and at the time it returned same, as found by the commissioner. No exceptions have been presented by the Government to his finding. (Finding VIII.)

Plaintiff actually expended $97,746.54 on the buildings and grounds, and $27,730.41 on account of furniture and fixtures. Its right of recovery, however, is limited to such sum as would be necessary to replace said property *in the same shape and condition as at the time when the Government took possession*, and the ascertainment of that sum, in this case, is a matter of extreme difficulty, for it is obvious, we think, from an examination of the record that much of plaintiff's expenditures were for the betterment and improvement of the property. In this connection, it should be noted that during the negotiations for a settlement of plaintiff's claim both plaintiff and the United States Veterans' Bureau separately examined the property and made estimates of the probable cost of its replacement and restoration, and there resulted a settlement agreement between plaintiff and defendant covering all damage, except for the cost of the restoration of the furnishings, which provided for the payment to plaintiff of the sum of $24,638.25, from which there was to be deducted the sum of $5,000 for certain bungalows which the Government constructed and left upon the premises. Payment under said settlement agreement was refused

by the Comptroller General, and this suit resulted. If there should be added to the $24,638.25 the full amount of the cost of restoring and repairing furniture and fixtures as claimed by plaintiff *in its brief*, $12,617.25, the total amount would be only $37,255.50. While the settlement agreement is not in any sense binding upon plaintiff, the court can not disregard the importance of that transaction as to an item for which plaintiff now claims in its petition the sum of $97,-746.54. It should further be observed that while plaintiff sued for the recovery of $97,746.54 for buildings and grounds, and $27,730.41 for restoring and repairing furniture and fixtures, it is asking in its brief for only $53,303.73 for buildings and grounds, and $12,617.25 for restoring and repairing furniture and fixtures. These matters are mentioned only as exemplifying the manifest uncertainty of plaintiff's judgment as to the amount properly chargeable to mere restoration and replacement.

The commissioner has found the cost of restoring the buildings and grounds to be $29,382.66, and the cost of restoring the furniture and fixtures to be $9,584.38. He held the hearings in the case on the premises, with the advantage that is afforded by personal contact with witnesses, and by a personal inspection of the particular items of property which are the subject of controversy, and his opinion is, therefore, entitled to great weight. We believe, however, that the evidence justifies a larger allowance for the cost of restoring furniture and fixtures than was fixed by the commissioner. We have determined this amount to be $11,-584.38; and we adopt the finding of the commissioner, $29,-382.66, as to the cost of restoring the buildings and grounds. In reaching this conclusion as to the buildings and grounds we have taken into consideration the value of the bungalows constructed by the Government and left on the premises.

The facts concerning the fire for which plaintiff claims damages are set forth in Finding XIII.

Plaintiff's claim under this item is based upon the sole allegation in the petition, "A forest fire was started by the inmates of the hospital while it was occupied by the United States and greatly damaged the premises." In its brief plaintiff states that—

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"the commissioner correctly states the contention of the claimant that the defendant is responsible for the fire loss on two grounds:

"(1) The fire loss was caused by the negligence of the methods of the hospital and is not excepted in the lease.

"(2) In any event the loss resulted from the negligence of the defendant in supplying, operating, and maintaining defective fire hose."

It will be recalled that the Government obligated itself to "replace all of said property in the same shape and condition as at the time the Government took possession thereof, ordinary wear and tear and *damage by fire* or *other casualty excepted:* * * *." (Our italics.) In discussing this question, and in citing authorities in support of its contention, plaintiff seems to have assumed that the terms "fire or other casualty," were intended to be used interchangeably. Clearly, they were not so intended. The words "fire" or "other casualty" relate to separate or distinguishable causes which might result in damage to the property. The language will bear no other reasonable interpretation. The damage in this case was caused by "fire," and we must determine whether or not defendant is liable under the contract for such damage.

The Government may not be held responsible in damages in this case except on the ground of negligence. Negligence is the want of ordinary care, and ordinary care is such care as an ordinarily prudent person would be expected to exercise, in like circumstances, where his own interests were involved. Applying this rule in the present case, What were the duties of the Government concerning protection from fire? The fire originated at a spot frequented and resorted to for gambling purposes by the hospital patients. The place was about five or six hundred feet from the garage, which adjoined the hotel building, and was in a dense growth of brush and timber, and was thereby quite "*completely isolated.*" (Finding XIII.) It is shown in the record that the patients had been accustomed to hide out on the premises for the purpose of gambling, and that the practice had been forbidden by the authorities who had watched diligently with the view of discovering them. The commanding officer made frequent trips over the premises for that pur-

pose, sometimes as often as twice a day. These patients were in no sense agents or employees of the Government. They were sick or convalescent soldiers, and even if it be assumed that the fire was caused by their negligent act, the Government would not be responsible for the damage resulting therefrom. And furthermore, the Government's position on this point is strengthened by the fact that it not only did not permit this practice by the patients, but used every reasonable effort to prevent it. The patients were not only admonished on the subject, but diligent and constant efforts were made to discover them while engaged in the forbidden practice. It was an exercise of more than ordinary care.

The plaintiff contends, however, that the Government was negligent in "supplying, operating, and maintaining defective fire hose." The fire broke out at a point some five or six hundred feet from the garage. Immediately upon the discovery of the fire the Government employees connected and ran out some four hundred or five hundred feet of hose from the fire truck which was located in the garage. This line of hose extended near enough to the fire for a stream of water to reach the fire. A coupling broke, or became disconnected, and a section of hose was supplied from a hose reel near at hand, which had been exposed to the weather, and the hose was not in good condition, and this extra hose broke under the pressure of the water. There was a high wind, and the fire was soon beyond control. It must be borne in mind that this fire did not occur in or about the hotel proper, or any of the surrounding buildings, but had its origin in the open, and on premises which contained 1,800 acres of land. The plain meaning of plaintiff's contention stated affirmatively is, that the Government negligently failed to supply suitable fire hose for the protection of the outlying area. The offending patients did not limit their activities to points within reach of fire hose, which had to be attached to the hydrant at the main building. They operated at other points more remote from the buildings and beyond the reach of any fire hose, whether sound or defective. Obviously, the fire hose was only intended for the protection of the buildings, and it is not shown that it was

insufficient for that purpose. There were ten or twelve lengths or about two thousand feet of hose on the fire truck. It was the extra hose which burst under pressure of the water. Certainly the disconnection of the coupling in the line of hose extending from the fire truck could not be charged as negligence on the part of the Government. However that may be, we have reached the conclusion that the Government was under no obligation to maintain fire hose for the protection of the outlying premises from fire.

The Government is not liable for the damage resulting from the fire. For cases in point see: *Smith* v. *Andrews*, 152 La. 783, and *American Grecian Turpentine Co.* v. *Harper*, 29 Ga. A. 101.

Plaintiff is entitled to recover the sum of $51,726.16.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

WADHAMS & COMPANY v. THE UNITED STATES

[No. H-162. Decided March 11, 1929]

On the Proofs

Income tax; affiliated companies; ownership of stock.—Plaintiff originally owned all the stock of another company, but in consideration of his services gave an inventor 20% thereof with an agreement that the inventor was not to sell the same to outsiders without first offering it to plaintiff. Under the circumstances, *held*, that plaintiff did not own "substantially all the stock" of the other company within the meaning of sec. 240(b)(1) of the revenue act of 1918, defining affiliated companies.

The Reporter's statement of the case:

Mr. Spencer Gordon for the plaintiff. *Covington, Burling & Rublee* were on the brief.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Wadhams & Company, is a corporation organized under the laws of the State of Oregon.

II. During the year 1922 and prior years the plaintiff company was engaged in the wholesale grocery business and also in the manufacturing business. During 1918 the plaintiff company organized the Perfection Manufacturing Company, a corporation, for the manufacture of ice-cream cones and took over all of its stock, for which it paid cash and tangible assets. Prior to 1918 it gave 20% of the stock of the Perfection Manufacturing Company to one Ben Opitz in consideration of his services as an inventor, retaining 80% of the stock of that company. Opitz represented himself as being an inventor and an expert mechanic and he was to develop certain machinery and certain patents which he was at that time working on. He was also to further the interests of the Perfection Manufacturing Company and to assist in making it a financial success. There was an agreement in writing between Opitz and the taxpayer, Wadhams & Company, whereby Opitz agreed not to sell his stock to outsiders without first offering it to Wadhams & Company. In September, 1918, Opitz left the employ of the Perfection Manufacturing Company because his plans had not materialized and his ideas had not worked out successfully and because the corporation had no further use for his services. He did not offer his stock to Wadhams & Company and Wadhams & Company had made no effort to secure it and it continued to stand in the name of Opitz.

III. The plaintiff, Wadhams & Company, for the year 1920 filed a consolidated income-tax return, including therein the income of the Perfection Manufacturing Corporation. During 1920 the Perfection Manufacturing Company had sustained a loss of $13,514.01, which loss reduced the amount of the consolidated net income of the two companies to that extent. The Commissioner of Internal Revenue held that the companies were not affiliated within the meaning of the act of 1920 and that Wadhams & Company should file a separate return, thus increasing its income to the extent of $13,514.01.

IV. During the year 1920, Wadhams & Company owned 80% of the stock of the Perfection Manufacturing Company. The remaining 20% of the stock was that which had been given to Ben Opitz by Wadhams & Company and was still held by him under the agreement whereby he was not to sell the stock to outsiders without first offering it to Wadhams & Company. Optiz was not employed by the Perfection Manufacturing Company during 1920. He did not offer his stock to the corporation, and the corporation made no effort to secure it. The stock of the Perfection Manufacturing Company was of no value in 1920, for Wadhams & Company had advanced to the Perfection Manufacturing Company all monies required by the Perfection Manufacturing Company for the original acquisition of the machinery needed by them in the operation, as well as all money needed subsequently to the extent of $35,531.72 before the end of 1920, which had not been repaid and which considerably exceeded the value of the tangible assets of the Perfection Manufacturing Company. During the year 1920, the Perfection Manufacturing Company was operated as a department of Wadhams & Company. The officers of the Perfection Manufacturing Company were all selected by Wadhams & Company or its directing officials. The Perfection Manufacturing Company occupied a building owned by Wadhams & Company; it occupied no other quarters, and rent was not charged by Wadhams & Company. Products of the Perfection Manufacturing Company were marketed by Wadhams & Company, involving the employment of some twenty-five salesmen and practically the entire time of a sales manager of Wadhams & Company. No charge was made against the Perfection Manufacturing Company by Wadhams & Company for this expense involved in marketing its products except $25 a month paid to the secretary of the Perfection Manufacturing Company by Wadhams & Company. The by-laws of the Perfection Manufacturing Company provided for the decision of any question arising at a stockholders' meeting by a majority of the stockholders present.

V. September 15, 1924, the Commissioner of Internal Revenue found an additional tax liability of $1,351.40

against Wadhams & Company for 1920 growing out of the disallowance of the affiliated status. From this decision the plaintiff duly appealed November 12, 1924, to the United States Board of Tax Appeals. September 9, 1925, the United States Board of Tax Appeals approved the determination of the commissioner. Thereafter, upon demand the plaintiff on December 11, 1925, paid the sum of $1,351.40 to the collector of internal revenue at Portland, Oregon. Claim for refund of the same was duly filed May 15, 1926, and was rejected by the Commissioner of Internal Revenue July 15, 1926.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The facts in the case are clearly and briefly stated in the findings. The case involves the construction of section 240 of the revenue act of 1918, 40 Stat. 1057, and particularly that portion thereof which reads as follows (p. 1082):

"(b) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, * * *."

The plaintiff did not "own directly or control through closely affiliated interests" or otherwise "substantially all the stock" of the Perfection Company. Opitz owned twenty per cent of it and was under no obligation to sell it to the plaintiff. In fact, he did not even offer to sell it, nor did the plaintiff endeavor to buy it. True, the plaintiff managed the business of the Perfection Company and controlled its operations, but in order to come within the provisions of the statute the control must be of substantially all the *stock*, and we think there were reasons for this language. The *Boston Structural Steel Co. case*, 1 B. T. A. 1004, is not an authority to the contrary. In that case there was control of all the stock through a right to purchase at any time at a fixed price.

The cases deciding what corporations are affiliated are very numerous, but no definite rule can be derived from them. In fact, they can not be entirely harmonized. The ultimate conclusion is that the decision must depend largely on the particular facts in the case under consideration.

We think the petition should be dismissed, and it is so ordered.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

JAMES DEB. WALBACH v. THE UNITED STATES

[No. H-337. Decided March 11, 1929]

On the Proofs

Army pay; dependent mother; rental and subsistence allowances; sec. 4, act of June 10, 1922.—See *Tomlinson* v. *United States*, 66 C. Cls. 697.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the brief.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff was an officer in the United States Army, on active duty, with the rank of captain from May 1, 1923, to March 10, 1927, and thereafter with the rank of major.

II. In May, 1905, plaintiff's father died, leaving no property whatsoever. Plaintiff is the only child of his mother. During the period in question he has contributed $125 a month to the support of his mother. She has no other relatives apart from her officer son to whom she can look for support.

She is not equipped by education or training for any vocation in life other than keeping house, which she has

done for her officer son. She has lived with him at the various posts at which he has been stationed as an Army officer, and does so still.

Her only other source of income is $722 per year, ground rents from certain real property situated in Baltimore, Maryland, on which there is a mortgage of $1,400, the interest on which, amounting to $70 per year, is paid by her.

III. The plaintiff received from May 1, 1923, to December 31, 1923, subsistence and rental allowance as an officer with dependents to an extent of $167.67 in excess of what would have been received by him as an officer without dependents. This sum was later disallowed by the Comptroller General and checked against plaintiff and refunded from his current pay and allowances.

He has received allowances from January 1, 1924, to date as an officer without dependents.

Allowances for subsistence and rental to him as an officer with a dependent would amount, from January 1, 1924, to June 30, 1927 in excess of that which he has received as an officer without dependents, to $854.14.

Total of claim:

May 1, 1923, to December 31, 1923	$167.67
January 1, 1924, to June 30, 1927	854.14
Total	1,021.81

The court decided that plaintiff was entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

Plaintiff, James DeB. Walbach, an officer of the United States Army on active duty with the rank of captain from December 18, 1922, to March 10, 1927, and of major from March 11, 1927, to the present time, is suing for recovery of rental and subsistence allowances on account of an alleged dependent mother under the provisions of sections 4, 5, and 6, of the act of June 10, 1922, 42 Stat. 625, as amended by the act of May 31, 1924, 43 Stat. 250, and of the act of May 26, 1926, 44 Stat. 654. The sole question for determination is whether or not the mother in this case is " in fact dependent on him for her chief support," within the meaning of section 4 of the above statute.

Opinion of the Court

From May 1, 1923, to December 31, 1923, plaintiff received an allowance for rental and subsistence on account of his mother, but this allowance was thereafter deducted from his pay by the Comptroller General. Plaintiff has sued to recover such allowance from January 1, 1924, to June 30, 1927, and the amount theretofore paid and later deducted from his pay.

Plaintiff is his mother's only child. During the period in question he has contributed to her support $125 per month. She is a widow fifty-eight years of age, and has had no training nor experience in business. She has lived with plaintiff continuously since plaintiff's graduation from West Point, and has taken care of the housekeeping. Out of the monthly contribution of the $125 plaintiff's mother purchases the household supplies, which are estimated to cost $95 per month. Aside from the contribution made by plaintiff, the mother has a net income of about $50 per month received as ground rental under a deed of trust from her mother. The gross rental amounts to $722 a year. There is a mortgage amounting to $1,400, the interest on which is paid by plaintiff's mother, and amounts to about $70 per year. Under these facts defendant contends that the mother in this case is not in fact dependent on the son for her *chief support*.

Each case arising under the statutes in question must depend upon its own peculiar facts. In the opinion in the case of *Chester V. Freeland* v. *United States*, No. E-621, decided in this court January 9, 1928 [64 C. Cls. 364], it is stated, "It is difficult to standardize the facts which disclose a condition designated in the law as 'chief support.'"

In the case of *Tomlinson* v. *United States*, decided in this court February 4, 1929 [66 C. Cls. 697], it was held that plaintiff in that case was entitled to the benefits of the statute now under consideration, although the mother owned property which yielded a fixed income of $55 per month. We believe that Congress intended, by the enactment of the statutes on this subject, to relieve officers of the Army and Navy from the necessity of providing out of their official salary for a mother who is without income sufficient for her

support, in accordance with her station in life. *Freeland case* and *Tomlinson case, supra.*

Plaintiff is entitled to recover the sum of $167.67, heretofore wrongfully deducted from his pay, and for rental and subsistence allowances, as claimed, from January 1, 1924, and judgment for the amount thereof will be entered on receipt of a statement from the General Accounting Office of the amount due plaintiff, in accordance with this opinion.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

BORG & BECK CO. v. THE UNITED STATES

[No. H-437. Decided March 11, 1929]

On the Proofs

Excise taxes; clutches; automobile parts.—Clutches and parts thereof for internal-combustion engines that are adapted for use on specific makes of automobiles and used for that purpose are taxable as automobile parts.

Same; burden of proof.—Where it appears that a very small portion only of clutches are for tractors and the rest for automobiles, the burden of proof is upon the taxpayer to show how many of such clutches were exempt from the tax on automobile parts.

The Reporter's statement of the case:

Mr. Alex Koplin for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The Borg & Beck Company, during the times hereinafter mentioned, was and now is a corporation organized, existing, and operating under and by virtue of the laws of the State of Illinois, with its principal place of business at Chicago, Illinois.

II. During the period in question, plaintiff was engaged in the manufacture of clutches for internal-combustion en-

gines, including parts of such clutches. A clutch is a device for connecting the power unit and the machinery to be driven thereby, so constructed that the power can be applied gradually, without jerk, and without putting undue strain on either the power unit or the machinery to be driven. The various types of clutches manufactured by plaintiff were adapted for use on automobiles, trucks, and tractors, and were so used for that purpose. During the period in question, plaintiff manufactured and sold for replacement purposes parts of the clutches which it made, among which were throw-out sleeves, ground rings, clutch covers, bell cranks, thrust rings, friction disks, clutch facings, clutch shafts, and brake flanges. On the parts enumerated, plaintiff was required to pay the taxes involved in the case. On other replacement parts manufactured for the same type of clutches, while plaintiff was required to pay the tax originally, the Commissioner of Internal Revenue held that they were not subject to taxes. The precise nature of all of these parts is not shown by the evidence, but it appears that certain parts not taxed were such as might be used in other machinery.

The clutches manufactured by plaintiff were all made on the same general plan so far as the clutch mechanism proper is concerned, but they differed in size, in strength, and in special features made for attachment to the machinery with which they were to be connected. As a result, plaintiff, in selling the parts, stated in connection with its circular list thereof, that—

"In ordering parts, it is absolutely necessary to state the make and model of car and model of clutch used. Model of clutch is stamped on plate on clutch cover."

The plaintiff made and sold a large number of clutches adapted for replacement in Chevrolet cars. The size of the clutch is generally determined by the size of the engine used, and the same size of clutch might be used both for automotive purposes and for commercial purposes. In some instances, exactly the same clutch was used in both tractors and passenger cars.

During the period in question, the clutch parts, taxes on which are the subject of this suit, were sold through jobbers as well as to manufacturers.

III. The plaintiff made and filed its manufacturer's excise tax returns monthly for the period October, 1922, to February, 1926, inclusive, showing the amount of tax due thereon, which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by the plaintiff, for the months, in the amounts, and on the dates hereinafter set forth as follows:

Period	Year	Month	Year	Page	Line	Amount	Date paid
Oct	1922	Nov	1922	81	5	$835.38	11/18/22
Nov		Dec		122	0	651.75	12/23/22
Dec		Jan	1923	86	7	306.36	1/7/23
Jan	1923	Feb		85	9	657.01	2/17/23
Feb		Mar		82	7	416.24	3/22/23
Mar		Apr		107	7	579.53	4/26/23
Apr		May		104	7	667.38	5/19/23
May		June		86	1	723.40	6/21/23
June		July		73	7	597.71	7/19/23
July		Aug		97	4	589.84	8/25/23
Aug		Sept		101	2	594.83	9/28/23
Sept		Oct		126	6	595.96	10/31/23
Oct		Nov		111	1	599.61	11/28/23
Nov		Dec		112	7	607.93	12/28/23
Dec		Feb	1924	110	9	350.36	2/26/24
Jan	1924	Apr		106	0	567.16	4/15/24
Feb		Apr		28	6	588.28	4/4/24
Mar		Apr		105	8	483.07	4/15/24
Apr		May		83	9	601.89	5/13/24
May		June		74	3	490.45	6/21/24
June		July		90	9	601.02	7/10/24
July		Aug		57	4	262.40	8/19/24
Aug		Sept		42	5	338.01	9/23/24
Sept		Oct		34	8	318.87	10/17/24
Oct		Nov		33	8	267.53	11/24/24
Nov		Dec		32	4	199.43	12/18/24
Dec		Jan	1925	38	5	150.72	1/20/25
Jan	1925	Feb		23	3	273.62	2/13/25
Feb		Mar		28	9	255.16	3/24/25
Mar		Apr		32	3	234.18	4/17/25
Apr		May		25	5	288.17	5/12/25
May		June		33	0	308.67	6/18/25
June		July		30	0	595.13	7/13/25
July		Aug		29	1	1,062.40	8/18/25
Aug		Sept		32	6	939.03	9/22/25
Sept		Oct		28	9	554.06	10/17/25
Oct		Nov		28	1	604.08	11/25/25
Nov		Dec		35	5	643.98	12/19/25
Dec		Jan	1926	30	0	513.39	1/21/26
Jan	1926	Feb		36	4	585.83	2/24/26
Feb		Mar		34	6	356.81	3/25/26

IV. On November 6, 1926, plaintiff filed its claim for refund, #394 of manufacturer's excise tax paid on clutches as shown by Finding III for the period October, 1922, to February, 1926, inclusive, in the amount of $18,946.02, which

was duly rejected by the Commissioner of Internal Revenue on July 16, 1927.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The evidence shows that the plaintiff is a manufacturer of clutches for internal-combustion engines, including parts of such clutches. The various types of clutches manufactured by plaintiff were adapted for use on automobiles, trucks, and tractors, and were used for that purpose. The plaintiff was required to pay an excise tax on certain of the parts of such clutches, and, claiming that they were not subject to tax under the provisions of the law with reference to automobile parts and accessories, now brings this suit to recover the taxes so paid.

The evidence also shows that the plaintiff manufactured various types of clutches which were adapted for use on automobiles, autotrucks, and tractors, and were sold for that purpose. While the clutches manufactured by the plaintiff were all made on the same general plan so far as the clutch mechanism proper is concerned, they differed in size, in strength, and in some instances in special features made for attachment to the machinery with which they were to be connected. The plaintiff, in offering the parts of these clutches for sale, stated in its circular list thereof, that—

"In ordering parts, it is absolutely necessary to state the make and model of car and model of clutch used. Model of clutch is stamped on plate on clutch cover."

This circular referred to passenger cars, motor trucks, and tractors, in such a way as to indicate that parts would be found described therein which were adapted to the particular machines for which they were ordered.

The evidence shows that in one instance at least, exactly the same clutch was used both in tractors and in motor cars; but as was said by this court in *Atwater Kent Manufacturing Co.* v. *United States*, 62 C. Cls. 419, the question is not whether they were parts of something after they were attached to one or another kind of machine to which

they were attached and in which they could function, but whether they were sold as parts for the articles enumerated in subdivisions (1) and (2) of section 900 of the revenue act of 1921, 42 Stat. 227, 291, and we have heretofore held that the fact that a part or accessory can be used in machines other than automobiles does not necessarily make it exempt from the tax. See *Cole Storage Battery Co.* v. *United States*, 65 C. Cls. 164, 170.

We think this case can be distinguished from the case of the *Milwaukee Motor Products, Inc.*, v. *United States*, No. H-40, decided October 22, 1928 [66 C. Cls. 295], and also from the case of *Berg Bros. Mfg. Co.* v. *United States*, No. H-436, this day decided [*ante*, p. 165]. In both of these cases, the timers which were sought to be taxed were sold as a part of a Ford engine and these engines were used as motors for a very large number of different kinds of machines other than automobiles. In fact, the "timers were not specially designed or primarily adaptable only for use on or in connection with automobiles." In the case at bar, it would seem from the advertisements of the clutches that unless a particular clutch was described, the purchaser would not be able to get the kind he wanted for his car. Why this was necessary does not definitely appear from the evidence, but we think we are authorized to find that the clutches were specially designed in different forms so that each form was primarily adaptable only to a particular machine. Mention is specially made in the advertisement of clutches for Chevrolet cars. Some of the designs listed were for tractors, but the evidence does not show how many, if any, of the parts of clutches for tractors were sold. It only shows, as above stated, that in one instance the same clutch could be used both in tractors and motor cars, although apparently designed for an automobile. If any parts were sold for clutches to be used on tractors, they would not be subject to the tax.

It is a matter of common knowledge that the number of tractors manufactured is very small indeed compared with the number of automobiles. As these parts were sold by plaintiff pursuant to orders made out in the form above

stated, we must conclude that all but a very small portion thereof at least, and possibly all, were sold as parts for automobiles and trucks and consequently were subject to the excise tax. The question is not free from doubt, but we think the burden was on the plaintiff to show how many, if any, of the parts so ordered were for tractors or other machines; in other words, to show to what extent it was not liable for the tax. This it has not done.

In coming to this conclusion, we do not find it necessary to determine whether the commissioner was correct in exempting from the tax certain of the parts of the clutches listed by plaintiff for sale. It would seem that some of these parts were of such a nature that they might be used in other machinery, but whether the commissioner was correct in this ruling or not has no bearing on the determination of the question involved in this case.

It follows that the petition of plaintiff must be dismissed, and it is so ordered.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

JAMES V. MARTIN, TRADING AS JAMES V. MARTIN AEROPLANE CO., v. THE UNITED STATES

[No. B-421. Decided March 11, 1929]

On the Proofs

Contract; settlement; receipt in full.—Receipt voluntarily executed by plaintiff, of an amount stated therein and shown as balance due under contract, *held*, in the absence of satisfactory evidence of misrepresentations to secure his signature, to preclude further recovery.

The Reporter's statement of the case:

Mr. Raymond M. Hudson for the plaintiff.

Mr. George Dyson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. On March 20, 1917, plaintiff, James V. Martin, a citizen of the United States, doing business under the name of James V. Martin Aeroplane Company, submitted to the Chief Signal Officer of the United States Army a proposal to build for the United States a certain biplane. On April 11, 1917, said Chief Signal Officer issued to plaintiff a purchase order, No. 7206, and in accordance with said proposal and purchase order the parties entered into a written contract on April 11, 1917, No. 1261, whereby plaintiff was to manufacture and deliver to defendant within eight months the plane therein described, equipped with two Packard engines, at and for the stipulated price of $67,000. Said purchase order appears as Exhibit A to plaintiff's original petition, which is therein correctly stated, except that the correct date is April 11, 1917. The contract also appears in plaintiff's original petition as Exhibit B. Each of said exhibits is by reference made a part of this finding.

II. Plaintiff did not have sufficient facilities of his own for the manufacture of said plane and sublet the contract to the Garford Manufacturing Company of Elyria, Ohio.

On June 9, 1917, the Packard Motor Company wrote a letter to plaintiff's subcontractor, advising that it could not furnish the engines. On June 14, 1917, plaintiff wrote to the aviation section, Signal Corps, War Department, as follows:

"I have the honor to request advice as to what the War Department desires relative to the motors for the Martin cruiser biplane.

"I enclose herewith copies of correspondence between the Packard Company and the Garford Company, as subcontractors under my contract order No. 7206.

"It is needless for me to call to your attention the immediate demand for this type aeroplane among the Allies, especially since the fact has recently developed that the Germans are using this type aeroplane mounting shell guns with terrible effect. I earnestly request that you direct the Packard Company to proceed with the two motors which they have already started for this cruising tractor.

"We have suspended all work awaiting your decision in this matter, but should you decide upon some other motor,

for instance the Curtiss or the Roberts, delay of six weeks or more would necessarily be occasioned by the extensive alterations required in transmission design."

On June 19, 1917, the Chief Signal Officer of the Army answered plaintiff's letter as follows:

"Receipt is acknowledged of your letter of June 14th. It is thought that to direct the Packard Company to proceed with two engines for your airplane would be an unwise procedure. This office will not direct your choice in another engine, but suggests you see what suitable types are available, and submit your choice for approval. The Sunbeam is suggested; the Roberts is not desired."

And he also wrote to plaintiff on July 10, 1917, as follows:

"In reply to your letter of July 1, you are advised that it is satisfactory to this division to install the Sunbeam in place of the Packard, provided there is no increase in price for the completed airplane."

III. Plaintiff did not deliver the plane contracted for within the time specified in the contract. On February 21, 1918, upon an investigation and an inspection of the plant of the subcontractor at Elyria, Ohio, by an officer of the Army, it was ascertained at that time that little progress had been made on said plane. A large number of parts partially finished were scattered around the plant, and the engines had not been received.

IV. The contract of April 11, 1917, was canceled, and on May 9, 1918, a purchase order was issued to the plaintiff for a Martin cruising tractor biplane at a stipulated price of $50,000. In this case the defendant was to furnish the engines. This order was attached to and made part of contract No. 40, which was entered into on May 11, 1918, both of which are made a part of this finding by reference.

V. The biplane, construction of which was begun under contract No. 1261, was continued to be manufactured under contract No. 40. It was delivered to and accepted by defendant on January 6, 1919. Under said contract No. 40 the plaintiff had received certain advances and at the time of delivery there was a balance due by the defendant to him of

$16,633.58. Before paying this balance to the plaintiff he was required to sign a receipt acknowledging the payment in full of all moneys due under the contract. On February 15, 1919, the plaintiff and his subcontractor signed the following receipt:

"Whereas prior to April 23rd, 1918, a certain contract No. 1261 was executed between the Signal Corps, United States Army, and James V. Martin, an individual, doing business as James V. Martin Aeroplane Company, Elyria, Ohio, covering construction of one airplane, known as the Martin cruising bomber; and

"Whereas on April 23rd, 1918, said contract No. 1261 was canceled by the contract section, finance department, equipment division, Signal Corps, and the construction of said airplane was covered by airplane engineering department contract No. 40, dated May 11th, 1918, between James V. Martin and the Government, represented by H. E. Blood, captain, A. S., S. C., the consideration therein named being fifty thousand dollars ($50,000.00); and

"Whereas the said contract No. 40 has been fully performed on the part of the contractor, the said airplane has been delivered at McCook Field and accepted by the Government; and

"Whereas the actual work of building said airplane was done by the Garford Manufacturing Company in its plant of Elyria, Ohio, said construction being under the supervision of said James V. Martin and under an agreement or arrangement between said James V. Martin and the Garford Company, to which agreement the Government is not a party.

"Now, therefore, in consideration of the payment to the said James V. Martin of the sum of sixteen thousand six hundred thirty-three dollars and fifty-eight cents ($16,633.-58), receipt of which is hereby confessed and acknowledged, the said James V. Martin accepts the above sum in full consideration of all sums due under the above contracts and acknowledges that it is in full of all necessary or incidental expenses entering into the construction or test of the above articles prior to delivery to and acceptance by the Government. The Garford Manufacturing Company, a corporation, existing and doing business under and by virtue of the laws of the State of Ohio, subcontractor to the said James V. Martin, by A. L. Patrick, its treasurer, acknowledges receipt of the sum of sixteen thousand six hundred thirty-three

dollars and fifty-eight cents ($16,633.58) from the said James V. Martin in full settlement and satisfaction of all claims of whatsoever nature incidental to the performance of all work under either or both of the above contracts.

"(Signed) JAMES V. MARTIN.
"THE GARFORD MANUFACTURING Co.,
"By A. L. PATRICK, *Treas.*

"FEBRUARY 15, 1919."

VI. The receipt was voluntarily signed by plaintiff, and there is no satisfactory evidence that any misrepresentations were made to plaintiff to secure his signature thereto.

VII. On February 26, 1919, plaintiff's subcontractor filed with the Air Service of the engineering division at McCook Field, Ohio, a claim for $60,481.33, claiming an excess cost of the work under the contracts over and above the contract price which had been paid. Said claim was returned to him on March 24, 1919, and he was advised that there was no way by which relief could be obtained by him except by an act of Congress, whereupon on April 30, 1920, the plaintiff filed the claim of the Garford Manufacturing Company, subcontractor, with the board of contract adjustment of the War Department under the provisions of the Dent Act; and, on July 14, 1920, the War Department claims board, appeal section, denied said claim, after having made findings of fact, which were transmitted to the plaintiff by letter of July 20, 1920, and by reference are made a part of this finding. There is no evidence to show that an appeal was made to the Secretary of War from said decision.

VIII. No satisfactory evidence appears that any insidious influences or unlawful conspiracies were in operation among any officers in the War Department to delay the work and construction of said biplane under either contract.

The court decided that plaintiff was not entitled to recover.

MEMORANDUM BY THE COURT

Upon the delivery of the plane in this case and the acceptance of same by the Government, plaintiff was paid the balance due on the contract, $16,633.58, and executed a re-

ceipt signed by both plaintiff and its subcontractor, Garford Manufacturing Company, which contained the stipulation that plaintiff "accepts the above sum in full consideration of all sums due under the above contracts (No. 1261 and No. 40) and acknowledges that it is in full of all necessary or incidental expenses entering into the construction or test of the above articles prior to delivery and acceptance by the Government." It is alleged in the petition that "This receipt was not intended by the plaintiff to be in full, and was obtained by the *lies* and *false* and *fraudulent* representations of Government officers." (Our italics.)

The commissioner has found that "The receipt was voluntarily signed by plaintiff, and there is no satisfactory evidence that any misrepresentations were made to plaintiff to secure his signature thereto." This finding is supported by the evidence.

The petition will be dismissed, and it is so adjudged and ordered.

JULIAN S. SMITH, CHAPMAN S. CLARK, TRUSTEES, v. THE UNITED STATES

[No. C-1145. Decided March 11, 1929]

On the Proofs

Eminent domain; just compensation.—See *Vandiver et al.* v. *United States, ante*, p. 125.

The Reporter's statement of the case:

Mr. Horace S. Whitman for the plaintiffs. *Mr. Stevenson A. Williams* was on the briefs.

Mr. William W. Scott, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Spesutia is the name of an island in the west side of Chesapeake Bay, Harford County, Maryland, just south of the mouth of the Susquehanna River. Spesutia Island contains approximately 1,900 acres of land. Title to all of it

was formerly in one owner, but many years previous to October, 1917, it was divided into three separate farms, namely, the Lower Island Farm, the Middle Island Farm, and the Upper Island Farm. The Lower Island Farm contains 970 acres more or less and is at the southern end of the island and 35 acres on the mainland side of Spesutia Narrows. For many years previous to the time of his death, Lower Island Farm was owned by one Robert H. Smith, who departed this life testate on the 11th day of September, 1915. By the terms of his last will and testament the said Robert H. Smith devised and bequeathed said farm to Julian S. Smith, Chapman S. Clark, and Frederick Von Kapff, subject to the use thereof for four years from the date of his death, by his daughter Nannie M. Clark, in trust to divide, apportion and assign, pay over, and convey to the beneficiaries named in his will. The said Frederick Von Kapff retired as trustee previous to the time of the filing of this action, leaving as the sole trustees under the will, Julian S. Smith and Chapman S. Clark.

The Middle Island Farm contained approximately 350 acres in the center of Spesutia Island, and was in October, 1917, owned by Annie C. Vandiver, Dorothy C. Vandiver, and Robert M. Vandiver.

The Upper Island Farm, containing approximately 500 acres at the northern end of Spesutia Island, was in October, 1917, owned by a corporation, the stock of which was owned and controlled by clubmen and sportsmen residing in New York City and elsewhere, and was used by them as a game preserve and hunting ground. Each of the farms extended across the island from the Chesapeake Bay on the one side to a channel of water about nine hundred feet in width, known as Spesutia Narrows. The Lower and Middle Farms on Spesutia Island had for more than one hundred years been cultivated and were very fertile and highly productive. Aberdeen was the nearest town and railroad point to the island, and from 1816 to 1917 access to the island had been by public road to a private road over the 35 acres on the mainland belonging to the owners of the Lower Island Farm, thence to the mainland side of Spesutia Narrows to a

landing on the said lands belonging to the owners of the Lower Island Farm, thence by ferry across the Narrows, and thence by a private road running from one end of the island to the other, through the three farms. Since 1816 the owners of the Lower Island Farm had been the owners of the fee simple title of thirty-five acres of land more or less on the mainland opposite the northwestern corner of Spesutia Island, consisting of thirty acres of land on Woodpecker Point, and the said private road one mile long leading therefrom to the public county road. In the year 1816 one Robert Smith, who was the then owner of the Lower Island Farm on Spesutia Island, acquired the thirty-five acre tract on the mainland opposite the northwestern corner of Spesutia Island and the road leading therefrom to the public road, by deed, at which time the said Robert Smith made the following declaration in writing, and recorded the same, with the deed, in the land records of Harford County:

"Mem. All the lands and tenements contained in this deed are held by me for the use and benefit of Benedict W. Hall, Edward G. Williams, and Samuel Smith, their respective heirs and assigns as proprietors of the several parts of Spesutia Island so that the several proprietors of said island may at all times have the free use of the same. As witness my hand this thirteenth day of August in the year eighteen hundred and sixteen.

"R. SMITH."

For more than one hundred years previous to October, 1917, the owners of the lands on Spesutia Island, jointly with the county commissioners of Harford County, Maryland, maintained for their use a ferry, which was operated from the Upper Island Farm to the mainland, and maintained a residence on the said thirty-five acres on the mainland suitable for a home for the ferryman and containing rooms for the accommodation of the inhabitants of the island and their friends. They also kept and maintained on the mainland stables sufficient to accommodate the horses owned by the inhabitants of the island, and in later years maintained a garage building for automobiles and other vehicles. From 1816 to October, 1917, the thirty-five acres

on the mainland, and the roadways above mentioned, together with the ferry operated across Spesutia Narrows, were used by the inhabitants of the island, including plaintiffs in this case, and their grantors, and was the principal means of ingress and egress to and from their lands to Spesutia Island for vehicular traffic and the principal means for all purposes. Occasional access was had to the island by boat from Havre de Grace, a distance of six miles. The ferryboat, maintained by plaintiffs and the other owners of the land on Spesutia Island, was of sufficient capacity to enable plaintiffs and the other owners to remove all of their crops and livestock from the island farms to the place of market. In the summer time when the weather was good threshing machinery and other heavy machinery were taken to the island on the ferryboat. In the winter time when the narrows were frozen over, and when the water was very rough, the inhabitants of the island could and did occupy rooms in the ferryhouse maintained on the mainland until such times as they could cross on the ferry. At such times they could and did leave their horses and automobiles in the buildings maintained by them on the mainland for such purposes.

II. Pursuant to the terms of the will of Robert H. Smith the trustees, Julian S. Smith and Chapman S. Clark, leased the Lower Island Farm to Nannie M. Clark for a term of four years from the 11th day of September, 1915, excepting therefrom the fish and game privileges attached thereto. In October, 1917, Nannie M. Clark was in possession of the Lower Island Farm on Spesutia Island under the terms of said lease made to her by the trustees under the will of Robert H. Smith.

III. On October 6, 1917, the Sixty-fifth Congress of the United States passed an urgent deficiency appropriation act (40 Stat. chap. 79, pages 345, 352, etc.) providing for the purchase of a proving ground and the payment of damages and losses resulting from the taking over of land for the proving ground. The act further provided:

"That if the land and appurtenances and improvements attached thereto, as contemplated under the foregoing appropriation, can not be procured by purchase, then the President

is hereby authorized and empowered to take over for the United States the immediate possession and title, including all easements, rights of way, riparian and other rights appurtenant thereto, or any land selected by him to be used for the carrying out of the purpose named in the aforesaid appropriation. That if said land and appurtenances and improvements shall be taken over as aforesaid, the United States shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to the said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. Upon the taking over of said property by the President as aforesaid, the title to all such property so taken over shall immediately vest in the United States: *Provided further*, That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to the expenditures authorized hereunder."

On the 16th day of October, 1917, pursuant to the said act of Congress the President of the United States issued a proclamation (40 Stat., part 2, page 1707) declaring certain lands in Harford County, Maryland, to be necessary for the establishment of a proving ground, which said lands included all the lands above referred to on the mainland and on Spesutia Island. The proclamation further provided:

"I do further order as to any land, appurtenances, and improvements attached thereto lying within the limits described above, which can not be procured by purchase on or before October 20th, 1917, that immediately thereafter possession and title, including all easements, rights of way, riparian and other rights appurtenant thereto, may be taken on behalf of the United States by the Secretary of War or his duly accredited representative or representatives for use for the purposes specified in the said act of Congress, subject to the provisions of said act as to compensation to be paid therefor."

IV. In the month of October, 1917, some officers of the United States Army visited Spesutia Island and called at the home of Nannie M. Clark on said island, stating that

they were there to advise her and the trustees that the Government of the United States had taken over Spesutia Island, and directed them to vacate therefrom and deliver possession thereof to the United States on or before the 1st day of December, 1917. Plaintiffs immediately verified the statements made by said officers by consulting with the commanding officer of the proving ground, and immediately thereafter accepted the said orders to vacate.

V. Thereafter, on the 14th day of December, 1917, the President of the United States issued a second proclamation (40 Stat., part 2, page 1731) whereby the President of the United States took over for the United States all that tract of land therein described for the purpose of establishing a proving ground thereafter known as the Aberdeen Proving Ground, in Harford County, Maryland. This proclamation contained the following language:

"This proclamation supersedes the proclamation issued on the 16th day of October, 1917, authorizing the Secretary of War to take over the lands above described, together with other lands, which prior proclamation, in so far as it is inconsistent with this proclamation, is hereby revoked."

All persons residing on the lands taken over were notified in the proclamation to vacate the same by January 1, 1918, and all owners of the land and improvements taken over were notified to appear before a commission and present their claims for compensation.

The lands taken over by the President by the last said proclamation did not include the Lower Island Farm of plaintiffs on Spesutia Island, or any part of Spesutia Island, but did include the mainland terminal of the ferry and all of the land, including the road described as aforesaid on the mainland, which was the main means of ingress and egress other than by water from the town of Havre de Grace to and from the island.

VI. Immediately subsequent to the date of the second proclamation of the President of the United States, the Government took over approximately thirty thousand acres of land, covered by said proclamation, and began the establishment of a proving ground thereon. The limits of the prov-

ing ground reserve included the thirty-five acres of land on which was located the private road, the ferry house, and other buildings heretofore mentioned, and a part of Spesutia Narrows. Immediately following the establishment of the proving ground on the land that was taken over by the Government, the buildings used by plaintiffs and other inhabitants of the island on the mainland were torn down and destroyed. Plaintiffs and the other owners were and have been since said time refused the right to maintain the ferry on the Government's lands, as theretofore maintained, and the Government also refused plaintiffs and the other inhabitants of the island, together with their employees and guests, the right to use without restriction that part of the private road within the limits of the proving ground except at the will and by the permission of those in authority at the proving ground. Since the day and date that the Government took over the lands and established the proving ground thereon all persons desiring to go to Spesutia Island are stopped at the limits of the proving ground by sentries; and if the noncommissioned officer in charge of the gate deems it proper, the person is given a pass directing him to appear at the administration building within twenty minutes, where he is required to explain the purpose of his visit; and if such explanation is satisfactory to the officer in charge, he is given a pass, not as a matter of right but at the will of the said officer in charge, to go to the island, but must report to the administration building for another pass before being allowed to leave the proving ground on his return from the island. All baggage, packages, bundles, merchandise, etc., are by regulations promulgated by the commandant of the proving ground, required to be taken to the administration building, opened and inspected by the military authorities before a pass will be issued allowing anyone to take baggage, packages, bundles, or merchandise through or from the proving ground.

The Government has built and constructed roadways over and across the proving ground, some of which roadways are built of concrete and others macadam. One of these roadways leads from near the administration building in the proving ground to the site of the ferry terminal. The Gov-

ernment will not permit heavy machinery of any kind to be taken over said roadways.

In the year 1918 the United States declared Spesutia Narrows and a part of Spesutia Island, including a large part of the plaintiff's lands, a danger zone from gunfire and aerial bombs from the United States Proving Ground, and published a map showing the said danger zone in the newspapers of Baltimore City and Harford County, Maryland, and through the same means warned the public, including the plaintiffs, not to enter the said zone. When plaintiffs and other persons passed through the proving ground to the island they had to pass through an area on the mainland declared to be a danger zone because of the flight of aeroplanes carrying bombs and other explosives. The United States established and operates upon the lands taken over for the Aberdeen Proving Ground a testing station for guns and established and maintains a flying field thereon for the training of aviators and the testing of aeroplanes and aerial bombs for war purposes, which training and testing include the carrying and dropping of bombs, flares, and other dangerous devices. Since the establishment of the proving ground, defendant's officers and enlisted men, operating aeroplanes, have at intervals operated aeroplanes carrying bombs and other explosives over plaintiffs' farm and have repeatedly operated aeroplanes carrying such bombs and explosives over Spesutia Narrows. One bomb was dropped near plaintiffs' barn. It does not appear from the testimony in the record just how frequently aeroplanes loaded with bombs have been operated over Spesutia Island. Such aeroplanes were operated over Spesutia Narrows almost daily.

From time to time the officers of the United States Army have fired shells from antiaircraft guns over and on the Lower Island Farm on Spesutia Island, several of which shells have burst on said land. One shell fired from a gun by defendant's officers burst in very close proximity to the front porch of the house occupied by Nannie M. Clark and her family.

In a few instances flares have fallen from aeroplanes flying over said farm. One flare fell in flames within a few feet from the front porch of the home of Nannie M. Clark.

Subsequent to the giving of notice to vacate, as heretofore mentioned, some enlisted men in charge of a United States Army officer entered upon the Lower Island Farm and cut several trees in furtherance of the Government's plan to use said farm.

Due to lack of access to Spesutia Island it has been since the establishment of the proving ground an impossibility for plaintiffs to operate their farm in a profitable manner.

On account of aeroplanes loaded with bombs and other explosives flying over the narrows and over the lands on Spesutia Island, and also on account of the fact that the inhabitants of the island have been denied the free right to go to and from the island through the Aberdeen Proving Ground, plaintiffs have been unable to keep necessary laborers on the farm to operate the same.

VII. Prior to October, 1917, a large part of the Lower Island Farm was in a high state of cultivation and very productive. The marshes and woodlands were very valuable for grazing and the raising of hogs and cattle, and were used for that purpose. The thirty-five acres of land on the mainland were particularly adapted for water-front development.

VIII. At and before the time the Government took possession of the thirty-five acres of land on the mainland, and the private right of way thereon, which plaintiffs and the other inhabitants of Spesutia Island used as a means of ingress and egress to their farms on Spesutia Island, the market value of the Lower Island Farm on the island consisting of 970 acres of land, more or less, was $100 per acre, or $97,000. Subsequent to the taking of the thirty-five acres of land on the mainland, and the right of way thereon, the market value of that part of the Lower Island Farm, consisting of 970 acres of land, more or less, was the sum of $50.00 per acre, or $48,500.

IX. The thirty-five-acre tract on the mainland, including the private roadway which contained about five acres, was used as a ferry terminal by plaintiffs and the other inhabitants of Spesutia Island. This land, together with the road-

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way, was taken by the Government under the second proclamation, and is now a part of the Aberdeen Proving Ground. It is a small peninsula extending into Chesapeake Bay. At the point touching the Narrows the land is very narrow, being approximately 150 ft. in width. It is rough land and was not at the time of the taking suitable for farming purposes. Since 1816 it was used by plaintiffs and their grantors, together with the other inhabitants of Spesutia Island as a ferry terminal, and as a means of ingress and egress to their farms on Spesutia Island.

For farming purposes the market value of the thirty-five-acre tract at the time of the taking was the sum of $2,500. For water-front development, which had already begun, the market value of said thirty-five-acre tract at the time of the taking was the sum of $15,000.

X. Subsequent to the filing of this suit the trustees under the will of Robert H. Smith, deceased, sold all of the Lower Island farm on Spesutia Island for $50,000. Approximately 500 acres of this land, entirely marsh land, were sold to Converse and Monell for $35,000 and the remainder, 470 acres, on which all buildings and improvements of the Smith or Lower Island farm were located, was sold to Nannie M. Clark for $15,000. In the deeds to Converse and Monell and to Nannie M. Clark the land conveyed was described by metes and bounds and no particular acreage was mentioned therein. Under date of May 17, 1926, Nannie M. Clark sold 162.5 acres of the land to Arthur H. Stump for $9,200, leaving Nannie M. Clark the owner of approximately 307.5 acres of said land, on which are located all of the buildings of the Lower Island or Smith farm, which she sold about June 1, 1928, for $90,000.

XI. The President of the United States, acting through the Aberdeen Proving Ground Land Purchasing Commission, made an award of compensation of $3,000, on February 14, 1918, for the aforesaid taking, which amount was unsatisfactory to the plaintiffs and was declined, and no compensation has been received by them for said land.

The court decided that plaintiffs were entitled to recover.

Syllabus

MEMORANDUM BY THE COURT

All of the questions involved in this case are determined by the rulings in the case of *Vandiver* v. *United States*, No. C–1081, decided by this court February 4, 1929. [*Ante*, p. 125.] Following the opinion rendered in that case we find that plaintiffs are entitled to recover the value of the thirty-five acres of property actually taken by the Government, which is shown to be $15,000; and the damage to the market value of the remainder of the farm situated on Spesutia Island, being about nine hundred seventy acres, as a result of the taking of the thirty-five acres on the mainland and depriving plaintiffs of the means of ingress and egress to and from said farm, which damage the findings show amounts to $48,500. Plaintiffs are also entitled to recover interest on this total amount of $63,500 at the rate of six per cent per annum from December 14, 1917, to the date of the award, February 14, 1918, which the defendant offered to pay, and thereafter on $61,250 from February 14, 1918 (date of the award), until paid, this latter amount representing the difference between just compensation ($63,500) and seventy-five per cent ($2,250) of the original offer of $3,000, on which interest is not allowable. It is so ordered.

JOHN HAMILTON CHINNIS v. THE UNITED STATES[1]

[No. D–8. Decided March 11, 1929]

On the Proofs

Navy pay; commissioned warrant officer; second period.—A chief machinist of the Navy, so commissioned February 5, 1923, under the act of March 3, 1909, having been warranted a machinist six years prior thereto, who had commissioned service during a part only of said six years, was not entitled on date of his commission as chief machinist to pay of the second period. Sec. 1, act of June 10, 1922.

[1] Certiorari denied.

The Reporter's statement of the case:

Mr. S. T. Ansell for the plaintiff.

Messrs. Frank J. Keating and *M. C. Masterson*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a citizen of the United States and is the sole owner of this claim and has never given encouragement to rebellion against the United States. He has a record in the United States Navy as follows:

Enlisted service

Enlisted 11 Dec., 1902.
Discharged 10 Dec., 1906.
Enlisted 28 Jan., 1907.
Discharged 27 Jan., 1911.
Enlisted 28 Jan., 1911.
Discharged 7 Dec., 1914.
Enlisted 8 Dec., 1914.
Appointed machinist to rank from 5 Feb., 1917.

Officer service

1917. Feb. 5, acting appointment as a machinist from Feb. 5.
Feb. 6, accepted appointment and executed oath of office this date.
Aug. 23, temporarily appointed ensign from Aug. 15, 1917.
Sept. 10, accepted appointment this date and executed oath of office 11 Sept.

1918. Sept. 4, tempo. appointed a lieutenant (j. g.) from June 1, 1918.
Sept. 23, accepted appt. and executed oath of office.
Oct. 25, tempo. appointed a lieutenant from Sept. 21, 1918.
Nov. 12, accepted appt. and executed oath of office.

1919. Feb. 17, warranted a machinist in the Navy from Feb. 5, 1917.

1921. Dec. 22, tempo. appt. as lieut. terminates Dec. 31, 1921.
Reverts to permanent status as a machinist.

1923. June 29, commissioned, ad interim, chief machinist, from 5 Feb., 1923.
July 7, accepted appt. and executed oath as chief mach. from 5 Feb., 1923.
1924. Mar. 11, commissioned regular (conf. ad interim) chief machinist from 5 Feb., 1923 (No. 0 and A).

II. The act of March 3, 1909 (35 Stat. 771), provides:

"The title of warrant machinist is hereby changed to machinist; and all machinists shall, after six years from date of warrant, be commissioned chief machinists, to rank with, but after, ensign, and shall, on promotion, have the same pay and allowances as are allowed chief boatswains, chief gunners, chief carpenters, and chief sailmakers * * *."

III. Section I of an act entitled "An act to readjust pay and allowances of the commissioned personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service," commonly known as the joint service pay act, approved June 10, 1922, prescribes the base pay for all commissioned officers except the highest grades, on the active list of the several services and provides that the base pay of the first period shall be $1,500 and that for the second period shall be $2,000 and also specifically provides:

"The pay of the second period shall be paid to captains of the Army, lieutenants of the Navy, and officers of corresponding grade who are not entitled to the pay of the third or fourth period; the first lieutenants of the Army, lieutenants (junior grade) of the Navy, and officers of corresponding grade who have completed three years' service, or whose first appointment in the permanent service was in a grade above that corresponding to second lieutenant in the Army; and to second lieutenants of the Army, ensigns of the Navy, and officers of corresponding grade who have completed five years' service."

And also further specifically provides that—

"Every officer paid under the provisions of this section shall receive an increase of 5 per centum of the base pay of his period for each three years of service up to thirty years: *Provided*, That the base pay plus pay for length of service of no officer below the grade of colonel of the Army, captain of the Navy, or corresponding grade, shall exceed $5,750."

The said joint service pay act also provides, in section 5 thereof:

"SEC. 5. That each commissioned officer on the active list, or on active duty below the grade of brigadier general or its equivalent, in any of the services mentioned in the title of this act, shall be entitled at all times, in addition to his pay, to a money allowance for subsistence, the value of one allowance to be determined by the President for each fiscal year in accordance with a certificate furnished by the Secretary of Labor showing the comparative retail cost of food in the United States for the previous calendar year as compared with the calendar year 1922. The value of one allowance is hereby fixed at 60 cents per day for the fiscal year 1923, and this value shall be the maximum and shall be used by the President as the standard in fixing the same or lower values for subsequent years. To each officer of any of the said services receiving the base pay of the first period the amount of this allowance shall be equal to one subsistence allowance; to each officer receiving the base pay of the second, third, or sixth period the amount of this allowance shall be equal to two subsistence allowances; and to each officer receiving the base pay of the fourth or fifth period the amount of this allowance shall be equal to three subsistence allowances: *Provided*, That an officer with no dependents shall receive one subsistence allowance in lieu of the above allowances."

Said rate was fixed for the fiscal year 1924 by the President under authority of said act, specifically providing:

"To each officer receiving the base pay of the first period the amount of this allowance shall be equal to that for two rooms; to each officer receiving the base pay of the second period the amount of this allowance shall be equal to that for three rooms."

IV. Plaintiff received base pay, including longevity, in the sum of $1,860.60 from February 5, 1923, to December 31, 1923, both dates inclusive. He received the sea pay of a warrant officer of the Navy after 12 years' service at $189.00 per month from February 5 to March 24, 1923, and shore pay of such an officer at $168.00 per month from March 25, 1923, to December 31, 1923. If it shall be found that he was entitled to the base pay of the second period, increased by 30 per cent for more than eighteen years' service for the period, February 5, 1923, to December 31, 1923, inclusive, there will be due him $493.85.

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V. Plaintiff received a money allowance for rental of quarters in the amount of $412.00 from February 5, 1923, to December 31, 1923. This amount was computed upon the money allowance for rental of quarters provided in section 6 of the act of June 10, 1922 (42 Stat. 628), for an officer with dependents receiving the base pay of the first period at $40 per month for the period February 5, 1923, to March 24, 1923, and April 12, 1923, to December 31, 1923. Plaintiff received rental allowances for the period March 25 to April 9, 1923, but was required to refund the same, he having been traveling at Government expense aboard the U. S. S. *Jason* during the said period. He did not claim rental allowance for April 10 and 11, 1923.

If it shall be found that plaintiff was entitled to the money allowance for rental of quarters provided in section 6 of the act of June 10, 1922 (42 Stat. 628), for an officer with dependents receiving the base pay of the second period at $60 per month for the period February 5, 1923, to March 24, 1923, and April 12, 1923, to December 31, 1923, there would be due him, as the difference between the total amount to which he was so entitled and the amount received as stated above, the sum of $206.00. If entitled to a money allowance for rental of quarters from February 5, 1923, to April 9, 1923, and April 12, 1923, to December 31, 1923, there would be due him the difference of $236.00. If entitled to such an allowance for the entire period February 5, 1923, to December 31, 1923, there would be due him a difference of $240.00.

VI. Plaintiff received a money allowance for subsistence in the total amount of $198.00 for the period February 5, 1923, to December 31, 1923, both dates inclusive. This amount was computed at 60 cents per day, the money allowance for subsistence provided in section 5 of the act of June 10, 1922 (42 Stat. 628), for an officer with dependents receiving the base pay of the first period. If it should be found that the plaintiff was entitled to a money allowance for subsistence provided in section 5 of the act of June 10, 1922 (42 Stat. 628), for an officer with dependents receiving the base pay of the second period at $1.20 per day for the period February 5, 1923, to December 31, 1923, there would

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be due plaintiff as the difference between the total amount to which entitled and the amount received by him, the sum of $198.00.

The court decided that plaintiff was not entitled to recover.

MEMORANDUM BY THE COURT

The act of June 10, 1922, 42 Stat. 627, provides:

"* * * Commissioned warrant officers on the active list with creditable records shall, after six years' *commissioned* service, receive the pay of the second period, and after twelve years' *commissioned* service, receive the pay of the third period; *Provided*, That a commissioned warrant officer promoted from the grade of warrant officer shall suffer no reduction of pay by reason of such promotion. * * *" (Our italics.)

Plaintiff had only four years, three months, and twenty-one days *commissioned* service, and was therefore not entitled to receive pay of the second period.

This same question was decided by this court April 20, 1925, in the case of *John T. Alexander* v. *United States*, and the petition was dismissed upon a conclusion of law without opinion, 60 C. Cls. 1032.

The petition will be dismissed, and it is so adjudged and ordered.

E. V. KNIGHT, EARL S. GWIN, AND HENRY E. JEWETT, TRADING AS THE KNIGHT MANUFACTURING CO., v. THE UNITED STATES

[No. D-751. Decided March 11, 1929]

On the Proofs

Contract; erection of pyrotechnic plant.—The findings failing to show a contract, proof of actual expenditures on work authorized by the Government, or satisfactory proof of traveling expenses in connection therewith, the petition was dismissed. See Dent Act, March 2, 1919, 40 Stat. 1272.

The Reporter's statement of the case:

Mr. Raymond M. Hudson for the plaintiffs.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiffs, E. V. Knight, Earl S. Gwin, and Henry E. Jewett, trading as the Knight Manufacturing Company, are citizens and residents of New Albany, in the State of Indiana.

II. In contemplation of the more active prosecution of the war, the War Department, in the fall of 1918, desired to increase its facilities of production of pyrotechnics, and to that end inquiry was instituted by the plant section, Ordnance Department, to determine where and how pyrotechnic plants could be built and operated by the Government. The general plan contemplated the erection of five or six Government-built and Government-owned pyrotechnic plants.

III. On September 18, 1918, Major Ernest J. Knabe, of the plants section, Production Division, Ordnance Department, telephoned to Mr. E. V. Knight, at New Albany, Indiana, and requested him to come to Washington with a view to consulting about a proposed pyrotechnic plant. Mr. Knight was an active business man and had substantial financial interest and a strong backing in his community. For fifteen months prior to these negotiations he had rendered services to the Government as a member of the District Draft Appeals Board, but had no knowledge of pyrotechnics, and so informed Major Knabe. Conferences were held between Major Knabe and Mr. Knight which ultimately resulted with Mr. Knight being requested to submit a proposition to organize a unit to manufacture pyrotechnics and a plant to be built and equipped by the Government. Mr. Knight, in company with engineers, made trips to Boston, Massachusetts, Staten Island, New York, and Bridgeport, Connecticut, to inform himself with what would be required in a plant to manufacture pyrotechnics.

Reporter's Statement of the Case

IV. On October 2 or 4, 1918, Mr. Knight submitted to Major E. G. Wilmer, Chief of the Trench Warfare Section of the Procurement Division, a proposition in writing whereby he and his associates offered to incorporate a company, to be known as the Knight Manufacturing Company, which should furnish the ground and to supervise the erection by the Government of a plant for the manufacture of pyrotechnics and to employ labor at the expense of the Government for the operation of the plant. The Government, under the terms proposed, should furnish all the materials for assembling 4,000,000 rockets and 10,000,000 position lights at the plant, and Mr. Knight and his associates should be paid for their services at prices specified for each article manufactured.

Major Wilmer turned down this proposition and did not even submit it to the Procurement Division to pass on.

V. A few days later Mr. Knight submitted a pencil memorandum to Major Wilmer, in which he offered to supervise the erection and management of a pyrotechnic plant to be constructed by the Government at New Albany, Indiana, and he was to be paid a monthly salary of $10,000.00. No action was taken on this proposition by Major Wilmer, and the same was withdrawn by Mr. Knight on the following day.

VI. At these interviews Major Wilmer informed Mr. Knight that he had only the power to negotiate for a contract and could only submit the terms agreed upon to his superior officers of the Procurement Division, who would determine whether negotiations should go through or not.

VII. On October 23, 1918, Mr. Knight submitted to Lt. Col. Arthur W. Fairchild, of the executive staff of the Procurement Division, and a member of the Board of Review, a proposal in writing superseding the memorandum submitted on October 4. Lt. Col. Fairchild then had charge of the negotiation of pyrotechnic contracts, Major Wilmer having gone overseas. The provisions of this proposal were substantially similar to the provisions contained in the proposal of October 4 which was rejected. Under this proposal,

the Government was to finance the entire proposition and the plaintiff was to make no contribution.

VIII. At the conference held on the 26th of October, 1918, between Mr. Knight and Lt. Col. Fairchild the proposal was gone over paragraph by paragraph. Col. Fairchild made numerous objections to certain provisions of the proposal, and informed Mr. Knight that he could only recommend a contract and that final authority rested with the members of the Board of Review of the Procurement Division. Colonel Fairchild refused to approve the proposal of October 23 and stated to Mr. Knight he would recommend a contract along the lines of the negotiations discussed at this conference.

Mr. Knight requested of Col. Fairchild a letter which he could take back to his associates, and Colonel Fairchild dictated in his presence and delivered to him the following letter:

"1. Following the negotiations with reference to proposed operation of the pyrotechnic plant in the vicinity of New Albany, Indiana, by a company to be organized by you, I beg to say that I propose to recommend that a contract for the operation of such a plant be given your proposed corporation. The terms negotiated between us will shortly be put in the form of a tentative agreement and passed through regular channels for approval."

IX. After a favorable report on the site at New Albany for the pyrotechnic plant had been made by Government engineers Colonel McFarland wanted the engineers of the plant section to make another inspection.

On October 31, 1918, the plant section recommended to Colonel McFarland the giving of a contract to the Knight Manufacturing Company, and in anticipation of a favorable decision on its recommendation the plant section requested that fifteen or more engineers from the construction department be sent to New Albany. Such an order was issued, but canceled on November 8, before the engineers left Washington. The recommendation of the plant section to award a contract to the Knight Manufacturing Company was held up and finally disapproved November 12, 1918.

Reporter's Statement of the Case

X. On November 1, 1918, Mr. Knight received the following telegram from the procurement division:

"Colonel McFarland has ordered investigation from Washington office of all proposed sites, and directs no further steps be taken in locating Government plants until inspection is completed."

Previous to the sending of the above telegram the Government engineers had been at New Albany to inspect the proposed sites for plants and had returned to Washington to make a favorable report.

XI. On November 4, 1918, Lt. Col. Fairchild sent Mr. Knight a telegram reading as follows:

"Have been directed to take no further steps at present regarding new pyrotechnic plant."

XII. On November 6, 1918, Lt. Col. Fairchild sent Mr. Knight the following letter:

"1. A wire was sent you on Saturday advising you of the orders from Col. McFarland regarding Government pyrotechnic plants.

"At that time I was not fully advised of the exact situation. My information now is that the elimination of quantities required to December 31st of this year, some changes in subsequent requirements, and the possibility of large increases in capacities of plants already in production, will very seriously modify the ideas of the department regarding the construction of Government plants. My wire was sent at the earliest possible moment so that you would take no further steps until the situation is entirely clear."

XIII. Mr. Knight came to Washington on November 6, 1918, and remained until November 12, 1918. On November 8, Mr. Knight had an interview with Col. McFarland, who was then Assistant to the Chief of Ordnance in charge of Trench Warfare Material and the superior officer of Major Knabe and Lieut. Col. Fairchild. Col. McFarland stated to Mr. Knight if any plants were built, the first plant would probably be built at New Albany.

XIV. On November 12, 1918, Colonel McFarland sent a letter to Major Knabe, as follows:

"1. You are advised that owing to the declaration of the armistice and the probable suspension of warfare, the pro-

gram appertaining to the operation of the manufacture of pyrotechnics is suspended and canceled.

"2. Under the circumstances, no further contract to increase the pyrotechnic facilities will be placed by the Government."

XV. There is no proof of any actual expenditures on work authorized by the Government, and there is no satisfactory proof of the expenditures for traveling. Both are estimated.

XVI. This claim was presented to the Board of Contract Adjustment and denied in 1920. There is no evidence to show any action by the Secretary of War.

The court decided that plaintiffs were not entitled to recover.

MEMORANDUM BY THE COURT

The negotiations between plaintiffs and representatives of the Government did not result in a contract. Further, the commissioner has found that there is no proof of any actual expenditures on work authorized by the Government, and no satisfactory proof of the expenditures for traveling. This case was submitted on the report of a commissioner, to which no exceptions were filed by either party.

The petition will be dismissed, and it is so adjudged and ordered.

CONTINENTAL BATTERY CO. v. THE UNITED STATES

[No. E-128. Decided March 11, 1929]

On the Proofs

Internal-revenue tax; payment of interest on refunds; statute applicable.—In payment of interest on refunds of internal-revenue taxes the Commissioner of Internal Revenue is governed by the statute in force at the time he makes the allowance of refund.

The Reporter's statement of the case:

Mr. Harry C. Kinne for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Reporter's Statement of the Case

The court made special findings of fact, as follows:

I. The plaintiff, a corporation, is the successor to the Lead Product Company, and since 1919 has been engaged in the manufacture and sale of automobile storage batteries and battery parts.

II. Under assessments made by the Bureau of Internal Revenue for periods from February, 1919, to January, 1922, for the manufacture and sale of batteries and battery parts, in some instances its predecessor, the Lead Product Company, and in others the plaintiff suing here, paid to the defendant certain amounts. These amounts and when paid as shown by the dates of the receipts are as follows:

Exhibit	Date paid	Amount of tax	Exhibit	Date paid	Amount of tax
7	Oct. 11, 1920	$1,295.01	19	May 9, 1921	$541.19
8	Jan. 7, 1921	107.12	20	June 14, 1921	471.48
9	Aug. 3, 1920	114.22	21	July 13, 1921	446.26
10	Sept. 1, 1920	237.97	22	Aug. 17, 1921	671.79
11	Oct. 4, 1920	316.02	1	Sept. 16, 1921	761.68
12	Nov. 3, 1920	314.47	2	Oct. 17, 1921	928.69
13	Nov. 13, 1920	395.22	3	Nov. 5, 1921	558.16
14	Dec. 14, 1920	312.36	4	Dec. 14, 1921	353.65
15	Jan. 11, 1921	352.45	5	Jan. 5, 1922	392.54
16	Feb. 19, 1921	330.05	6	Feb. 20, 1922	405.56
17	Mar. 8, 1921	590.70			
18	Apr. 18, 1921	633.16	Total		10,529.75

The receipts show the payments from October 11, 1920, to August 17, 1921, inclusive, to have been made by the Lead Product Company and the others by the Continental Battery Company.

III. The amount of $1,295.01 above set forth as having been received by the collector on October 11, 1920, represented in part an assessment, a penalty of 5 per cent and 25 per cent, and interest of 1 per cent which had been levied for the period from February, 1919, to May, 1920, for failure to make payment for said period within the proper time. Plaintiff paid the tax and penalty on October 11, 1920.

IV. Plaintiff made three claims for refund for the excise taxes above listed claimed to be erroneously collected in the sums of $3,092.39, $7,437.36, and $3,519.26. These claims were allowed in the sums of $2,682, September 28, 1923; $5,364, September 18, 1923, and $2,483.75, May 19, 1924,

respectively, with interest in the sums of $155.89, $302.96, and $240.04, respectively, said interest items being computed on the respective amounts allowed for refund from six months from the date of filing the respective claims to the date of the allowance thereof.

V. Thereafter, in response to a letter from plaintiff alleging inadequacy of the amount of interest granted on the refunds to it of the manufacturer's excise tax, the defendant, July 1, 1924, refused any further allowance.

The court decided that plaintiff was not entitled to recover.

MEMORANDUM BY THE COURT

This is a suit to recover interest upon the allowance of three claims for refund of excise taxes. The right to additional interest is the single issue. The refund claims were allowed on September 18 and 28, 1923, and May 19, 1924. Interest on the sums refunded was computed by the commissioner under section 1324 of the revenue act of 1921, which provides as follows:

"(a) That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of one per centum per month to the date of such allowance, as follows: (1) If such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment from the time such additional tax was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

The plaintiff contends that the commissioner should have computed the interest due under section 1019 of the revenue act of 1924 as reenacted by section 1116 of the revenue act of 1926. The case of the *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160, precludes a recovery.

The commissioner followed the statute in computing the interest allowable in every respect. The additional assessment claimed was not such a one as the act contemplated. The payment made involving additional taxes was by way of a penalty and interest for failure to pay the taxes assessed within the time required by the statute.

The petition will be dismissed. It is so ordered.

F. W. STEWART MANUFACTURING CORPORATION v. THE UNITED STATES [1]

[No. F-318. Decided March 11, 1929]

On the Proofs

Excise tax; sec. 900, revenue act of 1921; sec. 600, revenue act of 1924; accessories for automobiles; speedometer parts.—Speedometer parts, especially designed, manufactured, and sold for use on automobiles, adapted for no other purpose or use, are taxable under sections 900 and 600, respectively, of the revenue acts of 1921 and 1924.

The Reporter's statement of the case:

Mr. George M. Wilmeth for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is, and at all times mentioned herein has been, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at Chicago, in that State.

II. Plaintiff was, during the period in question, engaged in the manufacture and sale of parts for automobile speedometers, particularly speedometer gears, drive chains, or flexible shafts, and flexible housings for such shafts. Plaintiff did not manufacture or sell complete speedometers but

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[1] Certiorari applied for.

only the parts heretofore enumerated. Said articles were especially designed, manufactured, and sold for use on or in connection with automobiles and are not adapted to any other purpose or use. The excise taxes in question were paid with respect to said articles.

III. Between October 1, 1921, and October 31, 1925, there were levied and assessed against, and collected from plaintiff, and paid by it through the United States collector of internal revenue at Chicago, Illinois, on sales of speedometer gears, drive chains, or flexible shafts, and flexible housings for such chains or shafts, as hereinbefore described, taxes in the amount of $4,624.89. Subsequently claim for refund was filed with the Commissioner of Internal Revenue, which claim was rejected.

IV. Flexible drive chains, or shafts and housings, are used on other machines than automobiles, but those taxed in this case are specially manufactured and designed for use on speedometers which are used on automobiles.

The court decided that plaintiff was not entitled to recover.

MEMORANDUM BY THE COURT

The only question in this case is whether speedometer gears, drive chains, or flexible shafts, and flexible housings for such shafts, especially designed, manufactured, and sold for use on automobiles, and which were adapted for no other purpose or use, subjected plaintiff to liability for the payment of excise taxes under the provisions of section 900 of the revenue act of 1921, 42 Stat. 291, and section 600 of the revenue act of 1924, 43 Stat. 322, which levy taxes on parts and accessories sold on or in connection with automobiles, automobile trucks, and automobile wagons.

We think the articles in question were clearly subject to the tax. It is a matter of common knowledge that no automobile is now made and sold in this country without a speedometer, and that owing to the speed regulations which universally prevail it would be difficult to operate an automobile without this device. In fact an automobile would not be complete without a speedometer.

Martin Rocking Fifth Wheel Co. v. *United States*, 60 C. Cls. 466, is not an authority to the contrary. In that case the article sought to be taxed was not a part of the automobile, but merely a device used in connecting a trailer therewith. In fact, it in no way affected the operation of the automobile itself. The case is controlled by the decisions in *Cole Storage Battery Co.* v. *United States*, 65 C. Cls. 164, and *Walker Mfg. Co.* v. *United States*, 65 C. Cls. 394.

It follows that plaintiff's petition must be dismissed. It is so ordered.

EDWARD F. DELANEY v. THE UNITED STATES

[No. H-70. Decided March 11, 1929]

On the Proofs

Navy pay; retirement for age; sec. 1481, R. S.—Under the act of January 28, 1929, the retirement of a lieutenant of the Navy on December 25, 1922, he having reached the age of 64 years, was validated. The action of the Secretary of the Navy on September 17, 1925, in advancing him upon the retired list to commodore, retroactive to the date of retirement, was in accordance with sec. 1481, Revised Statutes, and the officer is entitled to the retired pay of a commodore dating from the time of retirement. See *Craig* v. *United States*, 65 C. Cls. 699.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the brief.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Edward F. Delaney, was born December 25, 1858, in New York.

He first entered the service of the United States Navy July 6, 1878, when appointed a paymaster's clerk, and continued to serve under successive paymasters until 1915, when

he was appointed to the commissioned office of Chief Pay Clerk.

Subsequently he was appointed and commissioned successively an assistant paymaster with the rank, first, of ensign, then lieutenant, junior grade, and lieutenant, as a passed assistant paymaster with the rank of lieutenant, and was then, December 14, 1920, commissioned ad interim a regular passed assistant paymaster with the rank of lieutenant to hold that office on the active list until December 25, 1922, when he attained the age of sixty-four years.

II. On or about December 10, 1922, plaintiff received the following letter from the Secretary of the Navy, dated December 9, 1922:

"From: Secretary of the Navy.
"To: Lieutenant Edward F. Delaney (SC), U. S. N., Navy Yard, New York, N. Y.
"Via: Commandant.
"Subject: Transfer to the retired list.

"1. On 25 December, 1922, you will have attained the statutory retirement age of sixty-four (64) years and will be transferred to the retired list of officers of the United States Navy from that date in accordance with a provision contained in the act of Congress approved 29 August, 1916.

"2. The department takes this occasion to express to you its appreciation for the long and valuable services which you have rendered to the country during your period of active service in the Navy, and wishes you years of health and comfort on the retired list.

"3. Please acknowledge receipt.

"EDWIN DENBY."

On the 17th of September, 1925, the Secretary of the Navy addressed an official communication to Commodore Edward F. Delaney, Supply Corps, U. S. N. (Ret.), advising him that he should regard himself as having been placed on the retired list with the rank of commodore in accordance with the provisions of section 1481 of the Revised Statutes, effective on the 25th day of December, 1922.

III. The Comptroller General of the United States, July 6, 1927, reports as follows:

" * * * that during the period from December 25, 1922, date of retirement, to March 31, 1927, last available roll on

file in this office, Edward F. Delaney has been paid at the net rate of $281.25 per month or $3,375 per annum.

"If held entitled to the difference between the retired pay of a commodore and the retired pay of a lieutenant with over thirty years' service, from date of retirement to March 31, 1927, there would be due the claimant $4,800, computed as follows:

Credit

Retired pay of commodore, 4 years 3 months and 6 days @ $4,500 per annum	$19, 200. 00

Debit

Retired pay received as lieutenant @ $3,375 per annum	14, 400. 00
Difference	4, 800. 00"

Continuing the difference between the retired pay of a commodore and the retired pay of a lieutenant from March 31, 1927, down to the date upon which judgment is rendered, at a difference between $4,500 a year and $3,375 a year, a difference of $1,125 a year, would make a total difference to the date on which judgment is rendered of $2,187.50.

The court decided that plaintiff was entitled to recover.

MEMORANDUM BY THE COURT

The Secretary of the Navy addressed a letter to the Speaker of the House December 12, 1927, a portion of which we quote:

"It is the view of the Navy Department that the provision above quoted from the act of August 29, 1916, repealed section 1445 of the Revised Statutes in so far as it relates to section 1444, Revised Statutes. This view is also taken by the compilers of the United States Code who, in the arrangement and wording of the code, make section 1445, Revised Statutes, applicable to section 1443 only. (U. S. Code, title 34, secs. 381, 382, 384.)

"The Comptroller General of the United States takes the opposite view, namely, that section 1445 is still in effect as regards both sections 1443 and 1444. (Comp. Gen. Dec. of September 24, 1926, vol. 6, p. 203.)

"The Navy Department has retired a number of officers who, if the view of the Comptroller General is correct, are illegally retired. The Comptroller General allows the payments to the officers so retired, but stated in his decision, cited above, that it is incumbent upon this department to recommend to Congress the enactment of legislation which will legalize the status of these officers."

The Comptroller General disallowed the plaintiff's claim on September 24, 1926 (6 Comp. Gen. 203), holding that the plaintiff was placed on the retired list in contravention of section 1445, Revised Statutes. This section uses the following language:

"SEC. 1445. The two preceding sections shall not apply to any lieutenant commander, lieutenant, master, ensign, midshipman, passed assistant surgeon, passed assistant paymaster, first assistant engineer, assistant surgeon, assistant paymaster, or second assistant engineer; and such officers shall not be placed upon the retired list, except on account of physical or mental disability."

The recent act of Congress, approved January 28, 1929, clarifies the situation and removes the legal conflicts in the way of plaintiff's recovery. This statute is as follows:

"An Act to repeal section 1445 of the Revised Statutes of the United States.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 1445 of the Revised Statutes of the United States is hereby repealed.

"SEC. 2. Section 1444 of the Revised Statutes of the United States is hereby amended to read as follows:

"'When any officer below the rank of Vice Admiral, including any officer of the Dental Corps, is sixty-four years old, he shall be retired by the President from active service: *Provided*, That the retirement of officers at the age of sixty-four years subsequent to August 29, 1916, is hereby validated.'"

The plaintiff is entitled to recover, and judgment is awarded him for $6,987.50. It is so ordered.

ARABELLA E. BODKIN v. THE UNITED STATES[1]

[No. H-262. Decided March 11, 1929]

On the Proofs

Special jurisdictional act, March 4, 1927.—The special jurisdictional act of March 4, 1927, providing for the filing of a petition in the Court of Claims by plaintiff, construed, and *held* as authority for reporting the facts to Congress, in lieu of dismissal of petition.

The Reporter's statement of the case:

Mr. Patrick H. Loughran for the plaintiff.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. This case comes to the Court of Claims under a special act of Congress known as Private No. 529, 69th Congress, approved March 4, 1927, and reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That within six months from the date of the passage of this Act a petition may be filed with the Court of Claims by or on behalf of Mrs. Patrick H. Bodkin, of Blythe, Riverside County, California, for a hearing of a claim for reimbursement for the value of the following described land, exclusive of improvements, as of February 28, 1921, to wit, that certain quarter section of land described as northeast quarter section 11, township 7 south, range 22 east, San Bernardino meridian, in the State of California, for which land her husband, Patrick H. Bodkin, deceased, had been issued a patent, and which she now holds as trustee for William B. Edwards in accordance with the decision of the United States Supreme Court in the case of Bodkin against Edwards (Two hundred and fifty-fifth United States, page 221), and the Court of Claims is given jurisdiction to hear and determine such claim: *Provided*, That in considering the case the Court of Claims shall determine the value of the land in question at the date of judgment by the court adverse

[1] Certiorari denied.

to Patrick H. Bodkin; also determine the value of the soldier's additional scrip and deduct the latter from any awards made to the claimant."

II. The claim thus recognized by Congress arose out of proceedings in the Department of the Interior and in subsequent proceedings in the United States District Court for the Southern District, Southern Division, of the State of California, the Ninth Circuit Court of Appeals and the Supreme Court of the United States, as follows, to wit:

Patrick H. Bodkin, husband of Arabella E. Bodkin (the petitioner here), contested and procured the cancellation of a homestead entry by one William B. Edwards of the aforesaid quarter section. On June 1, 1912, the said Patrick H. Bodkin made a homestead entry of the said quarter section. *Edwards* v. *Bodkin*, 42 Land Decisions, 172. Florence V. Bodkin, an unmarried adult daughter of Patrick H. Bodkin and Arabella E. Bodkin (the petitioner here) contested and procured the cancellation of a homestead entry by one Charles E. Geiger of the northwest quarter of section 11, township 7 south, range 22 east, San Bernardino meridian, in the State of California. The said Florence V. Bodkin died after cancellation of Geiger's entry, and after she had made application for homestead entry of the aforesaid northwest quarter, but before it was legally possible to allow an entry thereof under such application. On January 3, 1914, the Department of the Interior decided that the said Patrick H. Bodkin and the said Arabella E. Bodkin (the petitioner here) could lawfully make homestead entry of the said northwest quarter, as coheirs of the deceased Florence V. Bodkin, provided the said Patrick H. Bodkin relinquished the homestead entry which he had made on June 1, 1912, as aforesaid. The said departmental decision of January 3, 1914, concluded as follows:

"Thirty days from notice of this decision is therefore hereby allowed the father (the said Patrick H. Bodkin) of the said Florence V. Bodkin, appearing herein as one of her heirs, to elect whether he will relinquish his present homestead entry and make, with his wife as co-heir, homestead entry based upon said Florence V. Bodkin's application."

Reporter's Statement of the Case

(None of the decisions of the Department of the Interior involving the Geiger entry or the rights of Patrick H. Bodkin and Arabella E. Bodkin as coheirs of Florence V. Bodkin is reported in the Land Decisions.)

III. July 11, 1913, the said William B. Edwards and one Robert L. Culpepper were indicted in the United States District Court for the Southern District, Southern Division, of the State of California, for conspiracy against the said Patrick H. Bodkin and one James M. Ocheltree, homestead entrymen, in violation of section 19, Penal Code. The conspiracy against the said Patrick H. Bodkin consisted of acts of intimidation of him by the said Edwards and the said Culpepper in the exercise and enjoyment by the said Bodkin of his right to make effectual the homestead entry made by him on June 1, 1912, as aforesaid. April 17, 1914, the said Edwards and the said Culpepper were convicted. From the judgment of conviction they appealed to the Ninth Circuit Court of Appeals, which affirmed the judgment on May 17, 1915. *Edwards et al.* v. *United States*, 223 Fed. 309.

The said Edwards was arraigned under said indictment on July 28, 1913. At a time, to wit, March 6, 1914, when the said Edwards was in jail under the indictment, the said Patrick H. Bodkin, relinquished his homestead entry to the said northeast quarter, applied to appropriate the same under assignments to him of assignable soldiers' rights of additional homestead entry under sections 2306 and 2307 Revised Statutes, and, with his wife as coheir, made homestead entry of the said northwest quarter. On July 28, 1915, and August 6, 1915, patents were issued to Patrick H. Bodkin that passed to him the title of the United States in and to all the said northeast quarter. (October 23, 1919, a similar patent issued to Patrick H. Bodkin and Arabella E. Bodkin for the said northwest quarter.)

Thereafter the said Edwards sued in the United States District Court for the Southern District, Southern Division, of the State of California, to have Patrick H. Bodkin declared to be a trustee for Edwards of the title to the said northeast quarter. The suit was dismissed. *Edwards* v. *Bodkin*, 241 Fed. 931. Edwards appealed. The Ninth Cir-

cuit Court of Appeals reversed "with direction to deny the motion to dismiss, and with leave to plaintiff to amend his bill, if so advised." *Edwards* v. *Bodkin*, 249 Fed. 562. Thereafter the said Edwards amended his complaint "but not in any material respect as compared with the complaint passed upon by" the court of appeals. Thereafter the district court, stating that "the circuit court of appeals has settled the law of this case, and this court must follow the decision," entered a decree for the said Edwards. *Edwards* v. *Bodkin*, 267 Fed. 1004. Bodkin appealed. The court of appeals affirmed, saying that "the determination upon the first appeal (had) become the law of the case." *Bodkin* v. *Edwards*, 265 Fed. 621.

IV. On appeal by the said Bodkin to the Supreme Court of the United States, that court, acting on a motion to dismiss or affirm, to which no answer was made by the appellant, and viewing the case as one that "as presented here turns essentially on questions of fact," denied the motion to dismiss but sustained the motion to affirm. *Bodkin* v. *Edwards*, 255 U. S. 221. A petition for a rehearing was denied.

V. On February 28, 1921, the "certain quarter section of land described as northeast quarter section 11, township 7 south, range 22 east, San Bernardino meridian, in the State of California," and so described in the act of Congress above quoted, was, exclusive of improvements, of the value of $30,000.

The property, or ranch, as it is generally termed, is located in the Palo Verde Valley a few miles distant from the town of Blythe, in Riverside County, California. Its 160 acres were well leveled, properly irrigated, practically free from alkali, and untroubled by subirrigation. The ranch had been intelligently farmed, and its soil was well above the average of that found in the valley. One hundred and ten acres of the property were devoted to the cultivation of alfalfa and 40 acres to the raising of cotton. Prior to the fall of 1920, and while cotton was selling at peak prices, lands in the Palo Verde Valley were being used very largely for the production of cotton, and the property in suit was one of the few ranches where alfalfa was continued as the

principal crop. Lands in the Palo Verde Valley which are planted in cotton during consecutive years lose much of their fertility, whereas those lands which are planted in alfalfa become more fertile from year to year. During the latter part of the year 1920, and concurrent with the drastic break in the cotton market, lands in the Palo Verde Valley suffered a very large depreciation in market price, and even up to the present time there has been but a comparatively slight reaction from the low levels reached during that and the following year. Lands in 1921 and in following years sold, in many instances, for one-half and less than one-half of their 1919 and early 1920 market values. By reason of the character of the land involved herein, its location, together with the fact that it was particularly well adapted to the raising of alfalfa, it suffered something less of a depreciation in market value during the period of depression than did many other lands in the valley, and particularly those which had been used for the intensive cultivation of cotton.

VI. It has been stipulated into the record by counsel that the soldier's additional scrip referred to in the aforementioned special act of Congress was on February 28, 1921, of the value of $2,000, and the court so finds.

The court concluded that on February 28, 1921, the fair value of the land involved, exclusive of improvements, was $30,000.00, less $2,000.00 as the value on said date of the soldier's additional scrip referred to, or $28,000.00, and that any payment thereof rested in the judgment of Congress.

MEMORANDUM BY THE COURT

This case is now before the court on the defendant's motion for a new trial. The case was referred to the court under the special act set out in the findings.

The court was originally of the opinion that the special act authorized a judgment. The defendant's motion raises a serious doubt as to the existence of the right. The express language of the act confers jurisdiction "for a hearing of a claim for reimbursement for the value of" certain described premises. Manifestly Congress was considering the question as to whether the plaintiff was legally entitled

Memorandum by the Court

to reimbursement. The report of the committee discloses that the plaintiff was asserting a *right* to reimbursement for the loss of a homestead entry made upon the lands involved, and which was lost by the adverse decisions of the Circuit Court of Appeals of the Ninth Circuit, the decision being thereafter affirmed by the Supreme Court, 255 U. S. 221. Notwithstanding the ambiguity of the statute and the perplexing situation as to just what was intended, we think it is obvious that Congress did at least intend one certain thing, and that was to furnish the plaintiff a judicial forum wherein the asserted claim for reimbursement should be made the subject of judicial determination. *Tillson's case*, 100 U. S. 43, 46. If this position is not sustainable, there remains but one other course, and that is the jurisdiction of the court to find the facts and transmit the findings to Congress. This the court did in a case somewhat similar, *Ayres* v. *United States*, 44 C. Cls. 110, 121, and the defendant makes no objection to this course being pursued in this case. In fact, this is the extent of the court's jurisdiction under the present jurisdictional act. The report of the committee recites that in its opinion the decision of the court has done Bodkin an injury and injustice, for which his widow is entitled to relief, but clearly this court is not to enter into any discussion relative to the opinions cited in record. If recognition is to be accorded the plaintiff's contention, notwithstanding the final adjudication of the rights of Edwards and Bodkin to the lands in question, obviously it is a subject foreign to a justiciable issue, and one that rests with Congress and not the court. The court was in the first instance impressed with the opinion that there was a basis for awarding judgment in the case on the theory of a loss of lands by the plaintiff through the erroneous action of the Land Office in granting a patent to the same to Bodkin. This position we now believe to be untenable, and that the status of the case leaves open but one issue, and that is the value of the lands involved. Our final conclusion is predicated upon the existence of a doubt as to whether, in view of the record, we should dismiss the petition, or report the facts to Congress. We resolve the doubt in favor of report-

ing the facts to Congress, inasmuch as the act admits of such a construction. The findings will be amended to the extent of reciting the facts as they appear in the cases cited, and the court's conclusion as to a fair value of $28,000.00 adhered to. The former judgment of the court will be set aside and vacated. The findings as amended will be certified to Congress. It is so ordered.

SINNOTT, *Judge*, took no part in the decision of this case.

GEMCO MANUFACTURING COMPANY v. THE UNITED STATES[1]

[No. F-292. Decided March 11, 1929]

On the Proofs

Excise tax; accessories for automobiles; bumpers.—Bumpers, and bars, brackets, and fittings for use as replacement parts thereof, especially designed, manufactured, and sold for use on or in connection with automobiles and not adapted for any other purpose or use, are accessories for automobiles and under the Federal revenue laws taxable as such.

The Reporter's statement of the case:

Mr. George M. Wilmeth for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is and at all times mentioned herein has been a corporation organized, existing, and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located at Milwaukee, in that State.

II. Plaintiff was during the period in question engaged in the manufacture, sale, and distribution, among other things, of bumpers for automobiles, and bars, brackets, and fittings for use as replacement parts of such bumpers.

[1] Certiorari applied for.

Syllabus

Said articles were especially designed, manufactured, and sold for use on or in connection with automobiles, and are not adapted for any other purpose or use. With respect to the manufacture and sale of such articles, plaintiff, during the period in question, made returns and paid excise taxes for the amount of $32,040.86. Claim for refund in proper form and in due time was filed by plaintiff. Said claim for refund was rejected by the Commissioner of Internal Revenue.

The court decided that plaintiff was not entitled to recover.

MEMORANDUM BY THE COURT

The issue involved in this case has been many times before the court. The case, we think, falls within the following decisions: *Cole Storage Battery Co.* v. *United States*, 65 C. Cls. 164; *Walker Mfg. Co.* v. *United States*, 65 C. Cls. 394; *Advance Automobile Accessories Corporation* v. *United States*, No. H–3, decided October 22, 1928 [66 C. Cls. 304]; *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501; *Forged Steel Wheel Co.* v. *Lewellyn*, 251 U. S. 511; *Worth Bros. Co.* v. *Lederer*, 251 U. S. 507. The petition will be dismissed. It is so ordered.

MICHAEL F. MOLCHANOFF v. THE UNITED STATES

[No. J–677. Decided March 11, 1929]

On Motion to Dismiss Petition

Jurisdiction; special service rendered Shipping Board vessel.—Suit by the former second mate of a United States Shipping Board vessel for services rendered by him during the World War in displacing, with the consent of the crew, a disloyal captain and navigating the vessel and bringing her safely to port, and for an order from the court requiring the Shipping Board to reinstate him as second mate, *held* not within the authority of the court to hear and determine.

The Reporter's statement of the case:

Mr. W. F. Norris, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the motion to dismiss.

Plaintiff *in propria persona*, opposed.

The following memorandum by the court discloses the material facts alleged.

MEMORANDUM BY THE COURT

The plaintiff's petition seems from facts alleged to be one for salvage. The petition discloses that the plaintiff was second mate of the Shipping Board vessel *Arundo* during the World War. Allegations of the disloyalty of the captain of the vessel appear, coupled with a charge that the captain failed or refused to " navigate " the vessel on a voyage from Baltimore, Maryland, to Rio de Janeiro, and that the plaintiff, with the consent of the crew, assumed command and did successfully bring her into the port of Rio de Janeiro. It is further alleged that subsequent to the arrival of the vessel at Rio de Janeiro the captain entered into unlawful communication with certain submarine commanders, seeking the destruction of the vessel on her homeward voyage. The vessel, it is asserted, was laden with a valuable cargo, and through the extraordinary skill and seamanship of the plaintiff as a navigator the vessel successfully accomplished the voyage, avoided hostile submarines, and the vessel and cargo brought to its destination.

The plaintiff's suit is for the recovery of a large sum of money for services rendered under the above state of facts, and for an order from the court requiring the Shipping Board to reinstate him as second mate. It is manifest from the facts stated that this court is without jurisdiction to consider the case. Our general jurisdiction is set forth in section 145 of the Judicial Code, and under the facts alleged the court is without authority to hear and determine the claim. Whatever may be the merits of the plaintiff's contention, this court is powerless to determine the issue. In addition to what has been said, the claim relied upon arose

Reporter's Statement of the Case

between August and October, 1918, and would be barred under section 156 of the Judicial Code. Therefore, the matter of relief is one that rests in the discretion of Congress.

The petition contains various other general allegations, all of which we have carefully examined, but which we need not comment upon, as, in our view of the case, the pertinent allegations upon which the suit is founded are those recited above.

The defendant's motion to dismiss will be allowed and the petition dismissed. It is so ordered.

HUGH WILHITE, W. N. PITTMAN, HARRIS L. MOORE, TRUSTEES UNDER THE WILL OF WILLIAM STONE WOODS, DECEASED, v. THE UNITED STATES[1]

[No. F-380. Decided March 11, 1929]

On the Proofs

Federal estate-transfer tax; interest of testate's widow, State of Missouri.—See *Nyberg, administrator,* v. *United States,* 66 C. Cls. 153.

The Reporter's statement of the case:

Mr. L. L. Hamby for the plaintiffs. *Mr. Henry J. Richardson* was on the briefs.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway,* for the defendant.

The court made special findings of fact, as follows:

I. William Stone Woods, the decedent above named, died July 5, 1917, a citizen of the United States and a resident of the State of Missouri, naming as the executors Hugh Wilhite, W. N. Pittman, and Harris L. Moore, who duly qualified and were appointed as such executors. The decedent left surviving him, his widow, Bina M. Woods, and one child.

II. Thereafter under the provisions of the revenue act of 1916, as amended by the act of March 3, 1917, the said executors made and filed with the collector of internal revenue

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[1] Certiorari denied.

Reporter's Statement of the Case

for the sixth district of Missouri an estate-tax return for the estate of the said William Stone Woods, which disclosed an estate-tax liability in the sum of $219,160.01, which sum was paid to the said collector as follows: August 2, 1918, $100,000.00; September 13, 1918, $75,000.00; October 2, 1918, $35,372.33; and on April 5, 1919, $8,787.68.

III. Thereafter the Commissioner of Internal Revenue notified said executors in writing that upon an audit of the said return he had determined the estate tax imposed upon the transfer of the net estate of William Stone Woods to be $290,848.32 and that an additional tax was due in the amount of $71,688.31, which amount the said executors paid on February 8, 1922, upon demand of the said collector.

IV. Thereafter on January 3, 1923, the Commissioner of Internal Revenue refunded to said executors $6,216.55 and during the month of April, 1925, made a further refund to said executors of $1,494.05, the said refunds having been made upon the ground that taxes in the aggregate amount thereof had been improperly assessed and collected, but such refunds were not based upon any redetermination of the value of the gross estate of decedent, having been due entirely to changes in the amount of deductions allowed.

The total amount of estate taxes which have been paid as aforesaid, exclusive of the amounts refunded as aforesaid, is $283,141.72, which amount the Commissioner of Internal Revenue during the month of April, 1925, last determined to be the estate-tax liability of the said estate, and which amount has been covered into the Treasury of the United States.

V. In determining and computing the estate-tax liability of the said estate in the amount of $283,141.72 as aforesaid, the Commissioner of Internal Revenue determined the value of the gross estate of said decedent to be $3,936,830.52; the deductions allowable to be the sum of $714,816.22; and the value of the net estate to be the sum of $3,222,014.30.

VI. The Commissioner of Internal Revenue, in determining and computing the value of the gross estate of the said decedent, did not exclude therefrom any amount representing his widow's child's share under the provisions of section 319, revised statutes of Missouri, 1919.

VII. The last will and testament of the said William Stone Woods was duly admitted to probate in and by the probate court of Clay County, State of Missouri.

VIII. Said executors were, on the 18th day of August, 1922, discharged as such executors of the will of the said decedent, and since that date have been and are now trustees under the will of the said decedent.

IX. On or about July 21, 1925, the said trustees and E. H. Norton, administrator of the estate of Julia Woods Davies, deceased, duly made and filed with the Commissioner of Internal Revenue on a form provided by him a claim for refund of $71,688.31 estate taxes, or such greater amount as was legally refundable of said taxes theretofore paid as aforesaid, but on October 7, 1926, the Commissioner of Internal Revenue rejected the said claim.

X. In determining the value of the gross estate of the decedent upon a review and audit of the return filed by the executors, the Commissioner of Internal Revenue, by letter dated January 6, 1922, valued the real estate at $1,542,028.74 and the personal property at $2,394,801.78. The personal property consisted of stocks and bonds valued at $1,684,517.89 and of mortgages and notes and miscellaneous property valued at $692,617.22.

XI. In determining the amount of deductions to be taken from the gross estate the Commissioner of Internal Revenue, in his said review and audit of January 6, 1922, determined the debts of the decedent to be $455,406.05 and the administration expenses of the estate to be $117,763.54, which last item was comprised of executors' commissions in the amount of $97,934.31, attorneys' fees in the amount of $10,311.23, and miscellaneous expenses in the amount of $9,518.20.

XII. Upon consideration of the claim for refund filed by the executors the Commissioner of Internal Revenue allowed the following additional deductions from the gross estate by letter dated October 12, 1922:

$92.65 additional miscellaneous administration expenses
$510.00 additional attorneys' fees.
$51,168.58 additional executors' commissions.

XIII. Thereafter the said commissioner by letter dated March 12, 1925, upon consideration of the further claim for refund allowed, as further deductions from the gross estate, the following amounts:

$326.67 additional executors' commissions;

$10,436.31 additional attorneys' fees; and

$1,687.50 additional miscellaneous and administration expenses.

XIV. The total amount of debts and administration expenses which have been determined and allowed by the said Commissioner of Internal Revenue on account of debts of the decedent and administration expenses of his estate, aggregate $637,391.30.

XV. During the August, 1917, term of the Probate Court of Clay County, Missouri, in which court the estate of the deceased, William Stone Woods, was being administrated, his widow, Bina M. Woods, filed her application for distribution to her of her child's share in the personal property of the estate in which application the said Bina M. Woods alleged that she "is entitled by law, absolutely, to a child's share, being one-half of said personal property, after the payment of debts and expenses of administration; and is willing to give a refunding bond satisfactory to said executors in case of partial distribution, as herein asked, being made."

XVI. Upon the application of the widow of the said decedent for distribution to her of her child's share of the personal property of the decedent the said executors did, by order of the probate court of Clay County, aforesaid, from time to time make distribution to her or to her personal representative as and for her child's share in the personal property of the said decedent.

The records of the said court of Clay County, Missouri, show that, between August 22, 1917, and August 17, 1922, the sum of $818,235.32 was paid either to Mrs. Bina M. Woods or to the executors of her estate, on account of her child's share in the personalty of the estate or her husband, William Stone Woods, under the provisions of section 319,

Syllabus

R. S. Mo., 1919, and that the said Bina M. Woods died on January 14, 1918, and payments on account of her child's share were therefore made to her executors.

XVII. In the claim for refund, referred to in Finding IX, it is alleged that the application should be allowed for the reason that "the Commissioner erred in including in the gross estate the value of the child's share of the personalty belonging to the widow of the decedent in the amount of $823,845.65."

XVIII. On October 7, 1926, the Commissioner of Internal Revenue rejected the said claim for refund which was filed on or about July 21, 1925.

The court decided that plaintiffs were not entitled to recover.

MEMORANDUM BY THE COURT

The court thinks that this case is governed by the decision in the *Nyberg case*, No. H–441, decided June 18, 1928 [66 C. Cls. 153]. We are unable to distinguish any difference in principle between the two cases, and upon the authority of that case the petition herein is dismissed.

FREDERIC J. MIDDLEBROOK, AS RECEIVER OF HUDSON NAVIGATION COMPANY, v. THE UNITED STATES[1]

[No. D–391. Decided March 18, 1929]

On the Proofs

Charter contract; demise or contract for services.—Where the person named in a contract as charterer is given full control and disposal of the vessel, including its navigation, and the agreement is to "redeliver" the vessel, the contract is one of demise and not for services.

Same; control of navigation.—Where the captain of a vessel acts merely as sailing master and the orders he gives do not go beyond taking the vessel wherever directed by the charterer, the control of navigation, with respect to the question of demise or contract for services, is with the charterer.

[1] Certiorari denied.

Reporter's Statement of the Case

Same; marine risk; fire.—Fire which destroys a vessel while engaged in transferring its cargo to another vessel, due to the character of the cargo, is not a peril "necessarily incident to navigation," and does not come under the head of marine risk. Where the terms of the vessel's demise required return in good condition, ordinary wear excepted, the charterer is liable for the value of the vessel destroyed.

Plaintiff; conflict of interest.—Where the Government chartered a vessel from a company which it recognized as the owner, paid thereto the charter hire, and the charter party required redelivery to the same, and another company, with knowledge of all these facts, stood by, made no claim of ownership, control, or right to receive payment for charter hire, and did not intervene in the action for value of the vessel by reason of its destruction, the company that is party to the contract is not precluded from recovery because of any right the other company might have against it.

Same; assignment; intervenor.—Where under receivership proceedings all the property and assets of a corporation have pursuant to decree of court been conveyed to another company, said other company may intervene in suit brought in the Court of Claims by the receiver of the original company, and recover judgment, if any.

The Reporter's statement of the case:

Mr. M. Carter Hall for the plaintiff. *Carlin, Carlin & Hall* were on the briefs.

Mr. Arthur Cobb, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The Hudson River Navigation Corporation filed an intervening petition.

This case was first decided December 3, 1928. On defendant's motion certain amendments were made March 18, 1929, to the former special findings of fact, and these are incorporated in the report of the case. A supplemental opinion of the court was delivered with the amendments, and this appears after the original opinion.

The amended special findings of fact are as follows:

I. On June 27, 1917, the Hudson Navigation Company, a corporation, being in possession of the S. S. *Fenimore*, contracted with and chartered, as owner thereof, to the

United States of America the said steamship and delivered it to the United States under said charter, and thereafter the United States paid charter hire due under said charter directly to the Hudson Navigation Company, a copy whereof appears as Schedule C attached to the petition filed herein and is made a part hereof by reference.

II. The contract under which the said steamship was chartered to the defendant provided, among other things, that the—

"owners agree to let, and the said charterers agree to hire the said steamship from the time of delivery, for an indefinite period * * * and with full complement of officers, seamen, engineers, and firemen * * * to be employed in carrying stores belonging to the United States * * * in such trips or on such duty as may be directed by naval authority";

and that the "owner" should pay the wages of the captain and crew, for the insurance of the vessel against marine risks, or should assume such risks; also for necessary stores; and that the charterers should pay for all the coal and fuel, port charges, and consular charges.

III. The charter contract further provided that the charterers should pay for the "use and hire of the said vessel $195.00 per day" until the redelivery to the "owner" (unless lost); and also that they should redeliver the vessel in good order and condition, ordinary wear, tear, and depreciation, damage by the elements, collision at sea and in port, bursting of boilers, and breakage of machinery excepted.

The charter contract also provided "that the captain (although appointed by the owners) shall be under the orders and directions of the charterers as regards employment, agency, or other arrangements," and if the charterers were dissatisfied with the conduct of the officers, the "owner" should investigate the complaint and if necessary make a change in the appointment.

IV. The contract of charter also provided that the war risk, as covered by the statutes of the United States, should be borne by the United States; the marine risk by the "owner," with certain exceptions not necessary to be speci-

fied here; and that the steamer should work night and day if required.

V. The charter contract also provided that the steamer was "to be placed at the disposal of the charterers, * * * in such dock or at such wharf or place * * * as the charterers may direct," and that "the whole reach of the vessel's holds, decks, and usual places of loading, and accommodations of the ship * * * shall be at the charterers' disposal."

VI. From June 27, 1917, until June 22, 1918, the S. S. *Fenimore* was employed in the service of the United States in the transportation of supplies, stores, ammunition, powder, oil, and gasoline for the sole use of the battleships of the United States Fleet. This employment was continuous except that from April 9, 1918, to May 18, 1918, the steamship was out of the service being overhauled and repaired by the Norfolk Shipbuilding & Dry Dock Company under direction and orders from the Government. The Government deducted from current charter hire accruing to the Hudson Navigation Company both the cost of such repairs and the hire for the time the vessel was out of service. The H. N. Co. charged these deductions against defendant on its books. At the time of the fire and explosion which subsequently caused the destruction of the ship, the S. S. *Fenimore* was in good operating condition.

VII. During the time when the S. S. *Fenimore* was in the service of the Government the supply service of the Navy had the entire use of the vessel and it was subject at all times to the orders and directions of the officers of the Government, and at no time during said period did the H. N. Co. have the use of nor did it in an way interfere with or direct the operations of the vessel. The captain acted as sailing master—that is, he caused such movements of the crew as would take the vessel from place to place wherever and whenever the agents of the Government directed with such cargo as was placed thereon by the agents of the Government—and the said steamship became an essential part of the line and service of supplies for the war fleet. Such supplies included ammunition, oil, gas, and everything necessary for the fleet in time of war.

VIII. By direction of the agents of the Government the S. S. *Fenimore* was loaded about June 21, 1918, by stevedores under the control and supervision of officers of the United States Navy. The cargo included 95,000 pounds of ammunition, gasoline, shells, and powder, and a quantity of lubricating oil in barrels. Heretofore when the vessel was in the service of the Government under another charter the H. N. Co.'s agent protested against loading the steamship with oil, gasoline, ammunition, and explosives on the ground that the insurance on the vessel would be rendered void. He was told by Pay Director Hicks, of the United States Navy, who was in charge of the vessel, that it was no longer being operated under the steamboat inspection laws but as a United States naval vessel, and that the Government would be responsible. This conversation was reported to the H. N. Co.

The ammunition, powder, gasoline, and lubricating oil were placed on board in accordance with locations shown on forms prepared in the office of the superintendent of the annex. The sailing master did not and could not control the location of these war materials on the vessel. The steamship had three decks. The cargo was carried entirely on the main deck, where the space formerly occupied as a ladies' cabin and in the extreme stern of the vessel was loaded with ammunition. Twenty feet forward of the ladies' cabin was a social hall where there were loaded some barrels of gasoline. Forward of the social hall was the engine room, and that part of the main deck forward of the engine room was loaded with lubricating oils, which were thus placed a short distance from the boiler room. The captain observed that oil was leaking from the barrels containing lubricating oil, but as this oil was heavy with a high flash point and burning point, not readily inflammable unless it was vaporized and the vapor came in contact with a spark, it did not occur to him that there would be a probability of the oil becoming ignited from the heat of the boiler.

IX. The steamship subsequently arrived at Yorktown and under orders went alongside of a battleship to transfer its cargo. About two o'clock a. m. on the morning of June 22, 1918, a fire broke out which spread rapidly, and notwithstanding every effort being made to extinguish the blaze, all

hands were soon compelled to abandon the ship which was totally destroyed by fire and explosion. The proximate cause of the fire is not shown. No compensation of any kind for the loss of the S. S. *Fenimore* has been paid by the United States. Charter hire under the agreement between the parties was paid to the date of the loss of the vessel.

X. The S. S. *Fenimore* was of the river and bay steamer type, a combination freight and passenger carrier. It was of 1,634 gross tons, 253 feet on keel, and 36.3 feet wide. Its original cost complete was $185,000. Its fair market value when destroyed was $145,000.

XI. In June, 1917, a modern sprinkler system for protection against fire was installed on the steamer *Fenimore* according to plans of the United States Government inspectors and approved by them. While the steamer was under charter the Government took charge of fire drills as a precaution against fire on the boat and furnished a hose and additional buckets.

XII. Any insurance policies placed upon the vessel covering the period in controversy contained a provision stating in substance that they should become void if there was kept or carried on the vessel petroleum, gunpowder, or other explosives.

XIII. On May 6, 1914, a bill of sale covering the S. S. *Fenimore* was executed by the New York, Albany & Troy Transportation Line to the Hudson Navigation Company and duly registered. On December 17, 1915, a bill of sale covering the S. S. *Fenimore* was executed by the Hudson Navigation Company to the New York, Albany & Troy Transportation Line and duly registered. On January 1, 1916, the New York, Albany & Troy Transportation Line executed a mortgage of the vessel to Union Trust Co., of Albany, N. Y., to secure an issue of $100,000 in bonds, which were delivered to and continuously owned by the Hudson Navigation Company.

There was no delivery of the S. S. *Fenimore* pursuant to the said bill of sale dated December 17, 1915, but the Hudson Navigation Company remained in continuous possession of said steamship and operated said vessel and appropriated

unto itself all earnings therefrom. The name of the vessel was changed from "*Frank Jones*" to "*Fenimore*."

XIV. About February 16, 1921, Middleton S. Borland and James F. Emerson were appointed receivers of the Hudson Navigation Company by a court order, and duly qualified and entered upon the discharge of their duties. Emerson died January 31, 1922, and Borland was continued as sole receiver. Borland died about March 23, 1926, and Frederic J. Middlebrook succeeded him as sole receiver of the Hudson Navigation Company and of all its property and assets. By decree of the court appointing the receivers, dated December 1, 1925, sale was made of the assets of the Hudson Navigation Company to the Assets Purchasing Corporation, which sale was duly confirmed. Thereafter, and pursuant to said decree, the Assets Purchasing Corporation duly assigned and set over to the Hudson River Navigation Corporation all of its rights under said final decree of sale, including the right to receive a deed or other instrument of conveyance and transfer, of all of the property of the Hudson Navigation Company and assets of every kind, character, and description.

XV. On May 1, 1926, a special master, appointed by virtue of the final decree of December 1, 1925, conveyed to the Hudson River Navigation Corporation all the property and assets of every kind of the Hudson Navigation Company, and there was specially included in said conveyance 20 shares of capital stock of the New York, Albany & Troy Transportation Line; $100,000 par value, first lien 6% bonds, due January 1, 1926, of New York, Albany & Troy Transportation Line; also all other securities which the Hudson Navigation Company owned.

XVI. The Hudson River Navigation Corporation is a corporation organized under the laws of the State of Delaware and having its principal office in the city of New York; and on February 10, 1914, the Hudson Navigation Company became and was the owner of all stock of the New York, Albany & Troy Transportation Line.

The court decided that the intervenor, the Hudson River Navigation Corporation, was entitled to recover $145,000.

Opinion of the Court

GREEN, *Judge*, delivered the opinion of the court:

Both the plaintiff and the intervenor seek to recover the value of the S. S. *Fenimore* which, while in the Government service under a charter contract and engaged in transporting supplies to its Battle Fleet, was totally destroyed by fire and explosion.

The findings of fact show that the Hudson Navigation Company, being in possession of the S. S. *Fenimore*, chartered the vessel to the defendant. Subsequently receivers were appointed for said company by a court order. In succession, these receivers died and a new receiver was appointed who, since the commencement of this action by one of the original receivers, has been substituted as plaintiff herein. Finding XIV shows that by conveyances described therein the assets of the Hudson Navigation Company were transferred, first to the Assets Purchasing Corporation and afterwards by this last-named corporation assigned to the Hudson River Navigation Corporation, the intervenor herein. The title of the Hudson Navigation Company to the S. S. *Fenimore* appears to have been derived through a bill of sale executed in 1914 by the New York, Albany & Troy Transportation Line. In 1915 the Hudson Navigation Company executed a bill of sale covering the said steamship to the N. Y., A. & T. Line, which was duly registered; and in 1916 the N. Y., A. & T. Line executed a mortgage of the vessel to a trustee to secure an issue of $100,000 in bonds, which were delivered to and continuously owned by the Hudson Navigation Company. The effect of these transactions with the N. Y., A. & T. Line will be discussed hereinafter. At this point it is sufficient to say that the N. Y., A. & T. Line is not a party to the action. It is clear, therefore, that if anyone is entitled to recover in the case it is the intervenor, the Hudson River Navigation Corporation, which, by reason of the conveyances above set forth, became the owner of the claim now set up against the Government, if such claim be a valid one.

To prevent confusion, owing to the similarity of names, the Hudson Navigation Company, which executed the charter party or contract under which the *Fenimore* went into

Opinion of the Court

the Government service, is referred to in some of the findings of fact and in some parts of this opinion as the "H. N. Co."

An important question in the case is whether the contract between the defendant and the Hudson Navigation Company constituted a demise or letting of the S. S. *Fenimore* or merely a contract for services. On this point the decisions are not in entire harmony, and the earlier rule as laid down by the Supreme Court seems to have been somewhat modified by the later cases which we will consider.

The charter contract between the parties starts with an agreement "to let" the steamship and twice states that it was "to be placed at the disposal of the charterers, * * * in such dock or at such wharf or place * * * as the charterers may direct," and that "the whole reach of the vessel's holds, decks, and usual places of loading, and accommodations of the ship * * * shall be at the charterers' disposal," and "that the captain (although appointed by the owners) shall be under the orders and directions of the charterers as regards employment, agency, or other arrangements." This last statement with reference to the captain is not very clear, but in connection with the remainder of the contract, we think it means that the defendant was to have general authority over the captain. There is also a provision that the steamer was "to be employed in carrying stores belonging to the United States Government, * * * in such trips or on such duty as may be directed by naval authority acting for the charterers," and that the Government would "redeliver [the vessel] at charterers' option, in like good order and condition, ordinary wear, tear, and depreciation, damage by the elements, collision at sea and in port, bursting of boilers, and breakage of machinery excepted."

If the vessel was at the "disposal" of the Government, it is obvious that the H. N. Co. had lost control over it. The vessel was let "with full complement of officers, seamen," etc., and the whole of the vessel was at the "charterers' disposal," reserving only space necessary for the crew, tackle, fuel, etc., necessary for its operation. This provision gave the defendant the right to load the vessel in whatever manner it desired and dispose of the cargo on the decks of the

vessel as its agents directed. Pay for the hire thereof was to commence "on the day of her delivery" and "to continue until her redelivery."

It is contended on behalf of the defendant that the H. N. Co. did not surrender the navigation of the steamship to the defendant, and that unless this is shown there was no demise of the vessel. But the captain acted merely as sailing master. True, he gave orders or directions necessary to take the vessel wherever the agents of the Government directed, but the control of the navigation was exercised by the defendant, and, as was said by Mr. Justice Holmes in the case of *Standard Oil Co.* v. *United States*, 267 U. S. 76, 79:

"It no more mattered that the master took an active part in the navigation than that the ship still was steered by one of the crew."

That both the H. N. Co. and the defendant regarded the ship as absolutely under the control of the defendant is shown by letters received from the supply officer, Captain T. H. Hicks, who acted for the defendant, in one of which he said:

"It is requested that the captains of any vessels now under charter to the Navy Department be directed to carry out orders immediately, unhesitatingly, and without question";

and in another that—

"You will appreciate, of course, that in time of war a Government-chartered vessel must be available for any duty to which it is assigned and that no questions as to the advisability of employing the vessel on that particular duty can be tolerated."

On receipt of these letters, the president of the H. N. Co. gave directions that these orders should be carried out by the captains of the H. N. Co.'s vessels in the service of the Government. The evidence on the whole shows, as stated in Finding VII, that during the time when the vessel was in the service of the Government the Navy Transport Service had the entire use of the vessel and it was "subject at all times to the orders and directions of the officers of the Government, and at no time during the period did the H. N. Co. have the use of" nor did it "in any way interfere with

or direct the operation of the said " vessel. Upon a similar finding, it was held in *United States* v. *Shea*, 152 U. S. 178, and *Cornell Steamboat Co.* v. *United States*, 58 C. Cls. 497, 267 U. S. 281, that there was a demise of the vessel. The defendant relies to a considerable extent upon *Leary* v. *United States*, 14 Wall. 607, and a number of earlier cases. We have examined them with care and if any different rule is laid down therein it still remains our duty to follow the later cases.

It ought also to be said that the leading English cases harmonize entirely with the cases of *Shea* and *Cornell*, *supra*. In *Meikelreid* v. *West*, 1 Q. B. 428, the facts are very similar to those of the case at bar. It appeared that the ship was to be under the direction of the charterers to be employed in certain limits as directed by them, the charterers to pay for coals and all wages and expenses of the crew and to deliver up the ship to the owners in as good order and condition as when received. It was held that it was clearly a demise.

Much argument on both sides has been devoted to a consideration of the evidence with relation to insurance policies taken out on the vessel covering the period when it was in the service of the United States, and also as to whether any of these policies were enforceable after the vessel was used to carry oils and explosives. We do not think this evidence is material. The charter contract provided that the "owner" should pay for the insurance of the vessel against marine risks, or should assume such risks, and if any policies were taken out the H. N. Co. was only acting in accordance with the provisions of the contract. If the H. N. Co. went further than the contract required, this in no way affected its right under the charter.

The conclusion that there was a demise of the vessel is strengthened by the provision in the charter that upon the determination thereof the Government should redeliver the chartered vessel. This provision carried a clear implication that under the contract the vessel was to be first delivered to the Government and then on the conclusion of the contract delivery was to be made back to the H. N. Co. We

think there was clearly a demise, and that the Government was obligated to return the S. S. *Fenimore* to the H. N. Co. at the termination of the charter period, unless relieved of such obligation by some other provision in the charter or some facts and circumstances not so far considered in this opinion. The position of the defendant in such case would correspond with that of a bailee for hire with reference to property on land.

It is urged on behalf of the defendant that by a provision of the charter the "owner" assumed the marine risks which, it is argued, included fire. If this position is well taken, obviously there is no liability on the part of the defendant.

It seems to have been considered by counsel for defendant that all risks and perils must fall under one of the two classes of marine risks and war risks. We do not think this follows. There is another class of perils incident to property on land and therefore not marine risks, but they are not connected with war and therefore do not fall under the class of war risks.

It is immaterial whether the fire which destroyed the vessel was a war risk, if it was not a marine risk. The courts generally hold that a marine risk must be "of the sea" and not merely one occurring "on the sea," and that marine risks are "the perils necessarily incident to navigation." (Abbott's Law Dictionary.) So in the case of *The G. R. Booth*, 171 U. S. 450, damage caused by an explosion arising out of the nature of the cargo could not be considered a peril of the sea. In *The Giulia*, 218 Fed. 744 (C. C. A.), it was said that perils of the sea are understood to mean those perils which are peculiar to the sea. In the English courts, it seems to have been very clearly held that fire would not be a peril of the sea; so also was the ruling in *Slater* v. *Haywood Rubber Co.*, 26 Conn. 142. We think, therefore, that the fire which destroyed the vessel was not a marine risk.

This renders it unnecessary to determine whether the fire, under the circumstances, was a war risk, but it may be noted in this connection that the *Fenimore* was being operated under war-time conditions and as a part of a combatant

fleet. There can be no doubt, we think, that the *Fenimore* was engaged in warlike operations. On the day before she had been destroyed by fire she had been loaded by Government stevedores under the control and supervision of officers of the United States Navy, and her cargo included 95,000 pounds of ammunition, gasoline, and lubricating oils. There is every reason to believe that the fire would not have occurred had not oil in leaky barrels been loaded near the fireroom of the vessel, and that the difficulty in extinguishing the fire was greatly enhanced by the character of the cargo. We prefer, however, to rest our decision upon the ground that the fire was not a marine risk and therefore under the general rule where vessels are demised and the special provisions of the charter, the Government was bound to return the vessel in good condition, ordinary wear excepted.

It is further contended on behalf of the defendant that neither the plaintiff nor the intervenor is the real party at interest in the case or entitled to maintain an action for the loss of the S. S. *Fenimore* for the reason that the Hudson Navigation Company was not the owner of said steamship at the time of its loss.

In support of this contention, the defendant relies upon the fact that after the H. N. Co. acquired title to the vessel it executed a bill of sale to the New York, Albany & Troy Transportation Line covering the ship, which bill of sale was duly registered; and the New York, Albany & Troy Transportation Line executed a mortgage on the vessel to the Union Trust Company to secure an issue of $100,000 in bonds, which were delivered to and kept by the Hudson Navigation Company. The defendant also calls attention to some other details in the evidence which it claims tend to show that the H. N. Co. was not the real owner of the vessel at the time of the loss.

The record is silent as to what further action, if any, was taken with reference to the bill of sale, except that the evidence shows that it was entirely disregarded by the parties thereto and that there was no delivery of the S. S. *Fenimore* pursuant to the bill of sale. On the contrary, the H. N. Co.

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retained continuous possession and control of the steamship, operated said vessel, and received and appropriated unto itself all earnings therefrom without making any accounting of any kind to the New York, Albany & Troy Transportation Line. Finally, on June 27, 1917, the Hudson Navigation Company, as owner of the steamship, contracted with and chartered to the defendant the vessel and delivered possession to the defendant under the said charter. Thereafter the defendant paid charter hire due under the charter to the Hudson Navigation Company.

All the stock of the New York, Albany & Troy Transportation Line was owned by the Hudson Navigation Company. There is no direct evidence that the first-named company knew what the Hudson Navigation Company was doing with the steamship, but under the circumstances, and considering the close relations of the two companies, the New York, Albany & Troy Transportation Line must have known that the steamship was never delivered to it, and that the Hudson Navigation Company continued to use the vessel and to appropriate all of its earnings—in short, to treat the steamship as its own—and that it made the charter party contract with the Government as owner of the vessel and continued to appropriate the pay therefrom. The New York, Albany & Troy Transportation Line must have known also of the loss of the vessel and of the suit brought by the receiver of the H. N. Co. to recover its value. It has not intervened herein, nor, as far as it appears from the record, shown any interest in the proceedings.

On the other hand, there is nothing to show that the bill of sale was ever withdrawn or given up or that the bonds were ever canceled. Upon the whole, if it were necessary to determine whether the H. N. Co. was the owner of the vessel at the time of the loss, it might be a difficult question.

But this is not the real question in the case, which is, to which corporation, if any, was the defendant liable on account of the loss of the vessel. Here we find that the defendant contracted with the H. N. Co. alone and recognized it as the owner in the contract; paid the H. N. Co. for

the charter hire; and, what is still more important, the New York, Albany & Troy Transportation Line, with knowledge of all of the facts above recited, stood by and made no claim of ownership, control, right to receive payment for the charter hire, or right to intervene in this action. Whatever rights it may have had against the H. N. Co., it would not seem that it had any right of action against the defendant for the loss of the vessel under such circumstances. The defendant made no contract with the N. Y., A. & T. Line and did not recognize it as owner.

But it is not necessary to determine whether the New York, Albany & Troy Transportation Line could have maintained any action against the defendant. It has not and can not now, because such action would be barred by the statute of limitations; and in any event there is nothing in all of these very peculiar transactions, for which no explanation is found in the evidence, to in any way render invalid the contract of the defendant to redeliver to the H. N. Co. the vessel in good order and condition, subject only to certain specified exceptions not necessary to be considered here. Upon this provision of the contract the defendant must be held liable, its other defenses having been held insufficient.

The only remaining question in the case is as to the value of the vessel at the time it was destroyed. Much of the evidence that has been introduced on both sides is of doubtful competency, to say the least. The defendant offered in evidence the report of the inspection and survey made by the Joint Merchant Vessel Board of the Army and Navy. No member of this board was called as a witness for defendant. This court held in *Heathfield* v. *United States*, 8 C. Cls. 213, with reference to the recommendations of a board of survey, that "the decision of such an ex parte tribunal is not binding upon contractors, nor are its proceedings evidence against them." This report is clearly not competent evidence. Upon a review of all the testimony, we think there is sufficient competent evidence to sustain the finding of the commissioner that the fair market value of the *Fenimore* on June 22, 1918, was $145,000. This is much less than the value given by any of the plaintiff's witnesses, and it must be borne in mind that this was a war-time valuation.

Our conclusion is that the intervenor, the Hudson River Navigation Corporation, is entitled to judgment for $145,000, and it is so ordered.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

SUPPLEMENTAL OPINION ON MOTION FOR NEW TRIAL

Green, *Judge*, delivered the opinion of the court:

Upon consideration of the motion for a new trial, we find that certain amendments to the Special Findings of Fact are requested by defendant. In so far as these requests embody what in the opinion of the court are actually facts shown by the evidence, the findings have been amended to include such facts, although they do not appear to have any bearing on the opinion of the court and the judgment which should be rendered herein. No claim is made by the defendant that any provisions contained in the contract other than those set out in the original findings have any bearing on the questions involved in the case, and the same is true with reference to the other two matters as to which the findings are amended. The remaining requests of defendant for amendments and changes to the findings are denied as not being in accordance with the evidence.

One matter is presented in argument upon the legal features of the case to which no reference was made in the former opinion of the court for the reason that, although it is mentioned in the original argument, it was not pressed, no authorities were cited, and the court on the original submission did not consider that it was insisted upon. As the defendant now strenuously contends that the intervenor obtained its title to the claim upon which judgment is rendered by virtue of an assignment which is prohibited by law, it is thought that it would be well to state the reasons for rejecting this defense.

An examination of Findings XIV and XV will show that the intervenor does not rest his title upon an assignment from some other party, but obtains it by and through a conveyance made by a special master appointed by a court under

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a final decree and judgment in a case where receivers had been appointed for the Hudson Navigation Company. It is true that the Assets Purchasing Corporation had previously assigned to the intervenor its right to receive this deed and conveyance under the sale which had been ordered by the court, but this statement in Finding XIV is merely explanatory of how the special master came to execute the conveyance to the intervenor. The title of the intervenor rests solely upon the conveyance ordered and approved by the court.

In *Price* v. *Forrest*, 173 U. S. 410, 421, it is said:

"In *Goodman* v. *Niblack*, 102 U. S. 556, 560, where the question was whether the above statute [section 3477, R. S.] embraced voluntary assignments for the benefit of creditors, this court, referring to *Erwin* v. *United States*, said: 'The language of the statute, "all transfers and assignments of any claim upon the United States, or of any part thereof, or any interest therein," is broad enough (if such were the purpose of Congress) to include transfers by operation of law, or by will. Yet we held it did not include a transfer by operation of law, or in bankruptcy, and we said it did not include one by will.'"

The court then goes on to explain why such assignments can not be held to have been within the purpose and intent of the statute, and in the case then under consideration (*Price* v. *Forrest*, *supra*), held that the orders made in the State court transferring or assigning the claim in question against the United States were not in violation of the statute; and it should be observed also in this connection that part of the order was that an assignment be made of the original claim. The court further said on this point that (p. 425):

"* * * it is difficult to see how an order of a judicial tribunal having jurisdiction of the parties appointing a receiver of a claim against the Government and ordering the claimant to assign the same to such receiver to be held subject to the order of court for the benefit of those entitled thereto, can be regarded as prohibited by that section."

The decision would seem to go farther than is necessary in this case.

In *Seaboard Air Line Ry.* v. *United States*, 256 U. S. 655, 656, a number of cases are cited wherein "exceptions

to the general language of the section were recognized because not within the evil at which the statute aimed"; and, although in that case the transfer and assignment was not made by an order of court, it was nevertheless held valid. In *Western Pacific Co.* v. *United States*, 268 U. S. 271, 275, it is said that the statute "does not embrace cases where there has been a transfer of title by operation of law." See also *Davis Sewing Machine Co.* v. *United States*, 60 C. Cls. 201.

We think the case at bar comes clearly within the exceptions to the general language of the statute under the rules laid down by the Supreme Court. The other matters presented in defendant's motion for a new trial were fully reviewed by the former opinion and we find no reason for departing from the conclusion therein expressed. The motion for a new trial is therefore denied.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

PHILADELPHIA BOILER WORKS v. THE UNITED STATES

[No. D–562½. Decided March 18, 1929]

On the Proofs

Jurisdiction; Dent Act; absence of appeal to Secretary of War.— See *United States Bedding Co.* v. *United States*, 55 C. Cls. 459.

The Reporter's statement of the case:

Mr. Raymond M. Hudson for the plaintiff.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact as follows:

I. The Philadelphia Boiler Works was at the times hereinafter stated, and is, a corporation organized and existing under the laws of the State of Pennsylvania, engaged in the manufacture and erection of boilers, breechings, tanks, etc., having its principal office in the city of Philadelphia in the State of Pennsylvania.

II. On February 21, 1918, the Foundation Company, of New York City, entered into a contract in writing with the United States, represented by Lt. Col. R. C. Marshall, jr., Quartermaster Corps, whereby that company agreed to construct and complete a plant for the defendant for assembly of propellant charges near Tullytown, Pennsylvania. This contract was amended by supplemental contracts of July 31 and September 16, 1918.

III. On August 21, 1918, the Foundation Company sent a purchase order, numbered C–2447, to the plaintiff in connection with the performance of the contract of February 21, 1918, to furnish, deliver, and erect—

"1. Steel smoked breeching as per our drawing No. N1574–L–15, measurements to be verified by you. Same to be erected within 5 to 6 weeks from the delivery of first steel. The Foundation Company to make immediate application for priority. Price, $6,825.00."

IV. Immediately upon receipt of this order the plaintiff placed its orders with a steel mill for the necessary material.

V. On or about August 27, 1918, the plaintiff received the following letter from the Foundation Company:

THE FOUNDATION COMPANY,
Philadelphia, Pa., August 27, 1918.

Re Order 2447, smoke breeching

PHILADELPHIA BOILER WORKS,
1737 Filbert Street, Philadelphia, Pa.

GENTLEMEN: You will remember that on August 21, 1918, we gave you an order, No. 2447, which covered one steel smoke breeching, as per our drawing No. N–1574–L–15, same to be erected within five or six weeks' time, at a price of $6,825.00.

At the time your representative took this order he told us frankly that you did not have the material in stock to build the same, and would not be able to get it unless we secured for you an A–1 priority order.

Since giving you this order, Major Barry, of the Construction Division of the U. S. Army, has been notified by the Dupont Co., who are going to operate this plant, that we will have to get heat into the operating building by September 15th. As we are unable to get heat into the buildings by

September 15th unless the breeching is furnished we are simply compelled to make other arrangements.

Accordingly, we had representatives of the William Gordon Corporation call upon you in Philadelphia, and they advise us to-day that you have done nothing toward building the breeching for the reason that you did not have the material.

Upon receiving this information Major Barry has instructed us to cancel our order with you, and endeavor to get the breeching for our boilers from some other point.

It is not our practice to give a man an order and then cancel same on such short notice; but owing to the urgency of the matter we are compelled to take this step. Will you therefore consider this letter as a formal cancellation of our No. 2447 for the reasons above given? Major Barry is an exceptionally fair-minded man, and if you will submit a statement showing that you have been put to an actual loss on account of our canceling this order, I feel confident that he will make a fair and equitable adjustment with you.

Yours respectfully,

THE FOUNDATION COMPANY,
(Signed) L. C. HEILBRONNER,
Superintendent.

Approved:
Major E. J. BARRY,
Constructing Quartermaster, E. C.,
W. A. TAYLOR—LL. PIERCE,
New York (2).

The evidence does not disclose that any reply was made to this letter, but, under date of October 10, 1919, the plaintiff wrote to Brigadier General R. C. Marshall the following letter:

PHILADELPHIA BOILER WORKS,
1737 Filbert St., Philadelphia, Pa., October 10, 1919.

WAR DEPARTMENT, R. C. MARSHALL, Jr., Brigadier General,
Construction division of the Army, Washington, D. C.

(Attention of Major C. M. Foster, Quartermaster Corps.)

GENTLEMEN: Acknowledging receipt of your letter of October 2nd regarding claim No. 412.32 CR–MT (Tullytown Bag Loading Plant), we would advise as follows:

The material for this breeching was placed with the Nagle Steel Company at Pottstown, Pa. Referring to cancellation with the mill, we did not deem it advisable to cancel this material with the mill, inasmuch as the writer made a

personal visit, and after considerable discussion we were given a very good shipping date, so that to cancel the order within two or three days thereafter did not seem to be good business at that time. Had we done this we feel sure that any other orders that we might have had would have been held up indefinitely, bearing in mind that the war was still on and material very much sought after.

Referring to paragraph "C"—all the material was rolled and shipped from the mill.

Paragraph "D."—The work done by this company consisted of getting out sketches and making up a material list, the writer taking same to the mill, making a personal visit regarding delivery.

After the plates were received they, of course, were not in sizes that could be used without cutting. We were, therefore, compelled to handle and shear same to take care of the individual jobs in hand. The material in question was used on six or seven different jobs which came in afterwards and for which we could have bought the material at the prevailing price at that time, which was much lower than the price paid for these plates. In fact, we still have a few sheets of this plate on hand, which, on account of the extreme narrow widths, we have been unable to work in on any other job to advantage.

We trust that after going over the above you will see the justice of our claim and that same will be passed to our credit.

Yours very truly,

PHILADELPHIA BOILER WORKS,
WM. HUNTER, *Treasurer.*

WH-JB

Attested to be a true copy:

E. T. LINDNER, 2/28/20.
E. T. LINDNER,
Secretary Claims Board, Construction Division.

VI. At the time of the receipt of the purchase order of August 21, 1918, the plaintiff had other orders with the United States, and its own commercial work requiring steel-plate construction and steel at that time was very much in demand.

VII. All the steel plates ordered by the plaintiff were received from the steel mills, and as the plates were not in sizes which could be used without cutting, plaintiff cut the plates and used the material on six or seven different jobs in its Government and commercial business.

Reporter's Statement of the Case

VIII. On or before June 30, 1919, the plaintiff filed with the Board of Contract Review and Claims Board a claim for expenses, as follows:

To cancellation of order after material had been placed with mill at price of stock plates, namely, 1 cent per pound over mill price	$269.75
Hauling, handling, and waste	270.00
5 trips to Tullytown getting order, checking up dimensions, etc	75.00
	614.75

IX. The services actually performed by plaintiff consisted of the preparation of sketches for the smoke breeching, making up a material list, checking dimensions, placing order for steel, and five round trips between Philadelphia, Pa., and Tullytown, Pa.

X. The Board of Contract Review and Claims Board allowed the item of $75.00 and disallowed the two other items, and from its decision an appeal was taken to the Board of Contract Adjustment of the War Department, which board affirmed the decision of the Claims Board on June 10th, 1920.

The plaintiff refused to accept the award. The evidence does not disclose that an appeal was taken to the Secretary of War or that any action was taken by him.

XI. On September 25th, 1917, the Tacony Ordnance Corporation, of Tacony, Pa., entered into a contract in writing with the United States, represented by Col. J. E. Hoffer, Ordnance Department, to perform certain work for and to render certain services to the United States in connection with the manufacture of gun forgings.

XII. On October 7th, 1918, the plaintiff received a purchase order from the Tacony Ordnance Corporation as follows:

TACONY ORDNANCE CORPORATION,
Tacony, Philadelphia, October 7, 1918.

Order No. 4056

PHILADELPHIA BOILER WORKS,
1737 Filbert Street, Philadelphia, Pa.:

Erection, superintendence, and painting of 1,200,000-gal. steel tank on 1 119-ft. structural tower, as shown on Chicago Bridge and Iron Works B–P No. 5860.

Reporter's Statement of the Case

Price—Cost-plus basis not to exceed $5,000, which includes your sending superintendent to Charlestown while tank is being dismantled, freight from Charlestown to our works at Tacony, Philadelphia, and erection complete, including painting at our works on foundations installed by us.

Completion—Four weeks after arrival of all material at our works. You to have at least eight men erecting, at $1.25 per hour (double time for overtime), T. C. O. To supply hoisting engine for erection and air for riveters.

Government work—War, Ord. G. C. 129.

For equipment.

Approved Oct. 21, 1918.

W. F. R. WHITTINGTON,
Ord. Dept.

XIII. The tower and tank were purchased by the Tacony Ordnance Corporation and shipped from Charlestown, Illinois. Shipments were made under dates of November 23rd, December 5th, 7th, and 10th, 1918, but owing to conditions prevailing on the railroads at that time did not arrive at Tacony, Pa., until the months of January and February, 1919. The plaintiff paid the freight and the Government reimbursed it. After the material arrived the actual work was delayed by the Government's indecision to proceed, the armistice having been signed. After instructions were received to proceed with the work it was discovered no ladder had come with the other material, and the plaintiff was given an order to furnish and erect a ladder as an extra, at a cost of $540.00, which extra work was performed and the cost paid. The work of erecting the tower, tank, and the ladder was performed in four weeks after the material had arrived and the Government's instructions to proceed with the erection.

After the signing of the armistice the wage increase board increased the wages of certain classes of labor, including munition workers, which fact was brought to the attention of the Tacony Ordnance Corporation and Mr. Whittington, the representative of the Ordnance Department, who had approved the purchase order on behalf of the Ordnance Department. Mr. Whittington promised to look into the matter of increased costs of labor and to inform plaintiff of the Government's decision, but nothing further was heard from

him. The Tacony Ordnance Corporation ordered the plaintiff to proceed with the work, which the plaintiff did, and completed the work in the summer of 1919, at a cost of $8,838.59, including profit.

XIV. The plaintiff rendered a bill for $5,000.00, the contract price, and $3,838.59 for additional costs, to the Tacony Ordnance Corporation. Of this amount the Tacony Ordnance Corporation paid the $5,000.00 and declined payment of the additional costs.

XV. The Tacony Ordnance Corporation thereafter presented to the Philadelphia ordnance claims board of the War Department, in its own corporate name, a claim for the amount of these additional costs, and the ordnance claims board sent an auditor, who checked up the claim from the books of the plaintiff and found it correct. The Philadelphia ordnance claims board on November 21, 1919, rejected the claim. No further action in bringing this claim to the attention of any officer or agent of the United States was taken by either the Tacony Ordnance Corporation or the plaintiff until same was filed by plaintiff on June 14, 1920, with the board of contract adjustment of the War Department in accordance with Supply Circular No. 17 of the Purchase, Storage, and Traffic Division. On July 22, 1920, the board of contract adjustment denied all relief to the plaintiff in an opinion of that date. No appeal was taken to the Secretary of War.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of court:

The facts are fully stated in the findings. The suit involves two claims by a subcontractor. There does not seem to have been any privity between plaintiff and the Government in either claim. But, however this may be, both claims are informal, and enforceable only under the Dent Act. Each claim was at different times presented to and rejected by the Board of Contract Adjustment of the War Department, and in neither case was any appeal taken from that decision to the Secretary of War. The claims not having

been passed upon by the Secretary of War, this court is without jurisdiction. See *United States Bedding Co.* v. *United States*, 55 C. Cls. 459.

The petition should be dismissed, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* Moss, *Judge;* and BOOTH, *Chief Justice*, concur.

LEVY S. JOHNSON v. THE UNITED STATES

[No. H-54. Decided March 18, 1929]

On the Proofs

Army pay; aviation duty; flight surgeon; "flying status."—Medical officers of the Army Air Service who qualify as flight surgeons and are "placed on flying status," that is, ordered to participate regularly and frequently in aerial flights, and do so participate, are entitled to flying pay.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *Mr. Cornelius H. Bull* and *King & King* were on the briefs.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff was a first lieutenant of the Medical Corps of the United States Army serving at Luke Field, Pearl Harbor, Hawaii, on May 15, 1920.

II. The War Department published circular letters regarding the status, duties, and pay of flight surgeons of the Army and with a view toward encouraging medical officers to enter this work.

War Department Circular No. 189, dated April 25, 1919, regarding the office of flight surgeon, set forth that—

"3. The duties of a flight surgeon are essentially as follows:

"He has full charge of everything connected with the physical condition and care of the flier. The flight surgeon

lives with and associates with the aviators constantly. In this way he is able to determine when any individual is not in proper condition to fly. In order to do this he must be able, through tact and general efficiency, to gain the confidence of the fliers. For the same reason it has been demonstrated that the flight surgeon should take flying training and actually become a licensed pilot. Authority has been granted medical officers to take such training, and when they qualify they are entitled to all the rights and privileges of aviators, including the 'wings,' also a 25 per cent increase in pay from the time training is started. Medical officers who have been flight surgeons are enthusiastic over this work. They have undoubtedly saved many lives and much property."

In Circular No. 123, dated October 15, 1919, published by the War Department, the Director of Air Service stated:

"4. Flight surgeons will be encouraged in every way to take flying instructions. Upon completion of the prescribed test, flight surgeons will be rated in the same manner as other flying officers. Applications for flying training should be made through the surgeon to the station commander and will be accompanied by the necessary report of physical examination."

War Department Circular No. 78, published June 14, 1920, regarding flying duties to be performed by flight surgeons, announced that—

"2. The work performed by the flight surgeon is of great importance in that it has been undoubtedly responsible for the saving of many lives and much Government property, and the Air Service now requires that this specially qualified medical officer be stationed at each active flying field.

"3. On assignment to the medical division of the Air Service medical officers who desire to qualify as flight surgeons are first given a two months' course of instruction in their new duties at the Medical Research Laboratory, Garden City, L. I. On satisfactory completion of this course, they are ordered to duty at flying fields. After a few months' practical experience at such stations the officers who make application for the detail will be ordered to a pilots' school for a course of flying training. It has been demonstrated that the flight surgeon who is himself a flier is better qualified to do his special work in that he has experienced all of the sensations of flying, appreciates the stress which the flier undergoes, recognizes more quickly improper han-

dling of airplanes by pilots, when due to staleness or other physical causes, and most important of all, being a flier, he has the confidence and esteem of his fellow fliers."

III. On May 15, 1920, plaintiff received Special Orders No. 57, dated Headquarters, Second Observation Group, Luke Field, Pearl Harbor, T. H. The words of said order read as follows: "2. First Lieutenant Levy S. Johnson, M. C., is hereby placed on flying status, effective this date." The interpretation of the words "placed on flying status" contained in the above order, were, according to the understanding of such terms in the Air Service, an order requiring the officer to participate regularly and frequently in aerial flights.

IV. It was the duty of the flight surgeon when engaged in aerial flights to observe the physical and mental condition of the pilot and report to the commanding officer of the field his pathological condition, if any; mental disorders, if any may exist; and a general diagnosis of each pilot's condition, in order that the commander of the field might ascertain if a pilot is in the proper physical and mental condition to meet the monthly flying requirements of the War Department to maintain his flying status; viz, 10 aerial flights or 4 hours in the air. These medical observations prevented many losses of life, injuries to bodies, and damage to Government property.

V. It was an essential duty for Lieutenant Johnson to obey Special Orders No. 57, although failure to comply with same would not result in court-martial proceedings, but in all probability would relieve him from any flying duty. No one is forced to fly when proper excuse is given, but too frequent excuses given will result in his losing his flying status and being transferred to another branch of service, where he would not receive the 50 per cent increase in pay for flying duty received when engaged in flying.

VI. Plaintiff thereafter performed ten flights or completed four hours flying each month in Government aircraft at Luke Field, Hawaii, and received $934.12 during the period June 1, 1920, to March 30, 1921, constituting 50 per cent additional pay for said flying duty.

Opinion of the Court

VII. On March 29, 1921, plaintiff received Special Orders No. 44, dated Headquarters, Second Observation Group, Luke Field, Pearl Harbor, Hawaii, March 29, 1921, relieving him from duty, requiring him to participate regularly and frequently in aerial flights effective from that date.

VIII. Subsequent to receipt of said $934.12, flying pay received during the period May 15, 1920, to March 31, 1921, plaintiff was required to refund this amount to the United States by monthly deductions of $50 per month from his pay, beginning November 23, 1921. No part of this sum has been restored to him.

The court decided that plaintiff was entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This is a claim of an officer of the Medical Corps for 50 per centum increase of pay for the period from May 15, 1920, to March 31, 1921, inclusive, during which time he was detailed to duty as a flight surgeon at Luke Field, T. H. The sum of $934.12 was paid to plaintiff but was later deducted from his pay for the reason that during the time in question there was no provision of law authorizing the payment of increased flying pay to an officer of the Medical Corps. Plaintiff is suing to recover said sum.

The claim arises under the acts of June 4, 1920,[1] 41 Stat. 769, and June 30, 1922,[2] 42 Stat. 724.

The findings show that plaintiff was in fact on duty requiring regular and frequent aerial flights. It was his duty when engaged in aerial flights to observe the pilot's mental and physical condition and report to the commanding officer what he had observed and whether the pilot was in proper physical and mental condition to meet the monthly flying requirements of the department to maintain his flying status.

[1] "Officers and enlisted men of the Army shall receive an increase of 50 per centum of their pay while on duty requiring them to participate regularly and frequently in aerial flights; and hereafter no person shall receive additional pay for aviation duty except as prescribed in this section."

[2] "That the authorization for increase of flying pay contained in section 13a of the act of June 4, 1920, shall be construed to include any officer of any branch of the service who may be ordered by proper authority to perform duty requiring him to participate regularly and frequently in aerial flights."

The plaintiff after his assignment performed the flights required of him during the period from June 1, 1920, to March 30, 1921. The service was of a dangerous character, inasmuch as he took the chances of the inefficiency of the man whose condition he was undertaking to ascertain.

The flying service was a part of his regular duty and was not incidental as in the *Culver case*, 60 C. Cls. 825, 271 U. S. 315. The case is covered by the principles announced in *Bradshaw* v. *United States*, 62 C. Cls. 638, and *Luskey* v. *United States*, 56 C. Cls. 411, 262 U. S. 62.

The plaintiff is entitled to recover the sum of $934.12, the amount deducted from his pay, and judgment should be entered for that amount. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

SWIFT & COMPANY (OF WEST VIRGINIA) v. THE UNITED STATES

[No. J-211. Decided March 18, 1929]

On the Proofs

Statute of limitations; refunds; consolidated returns; claim by parent company in behalf of subsidiary.—A claim for refund of internal-revenue taxes filed by a parent company in behalf of a subsidiary as an amendment to the original consolidated return, is a claim filed by the subsidiary within the meaning of the statute of limitations governing refunds.

The Reporter's statement of the case:

Mr. G. Carroll Todd for the plaintiff. *Messrs. Albert H. Veeder, Henry Veeder, Francis E. Baldwin* and *T. Hardy Todd* were on the brief.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is now and was at the time of the filing of this action, and during all of the times hereinafter mentioned, a

corporation duly organized and existing under the laws of the State of West Virginia, with its principal place of business at Chicago, Ill.

II. For the purposes of the war excess-profits tax imposed by the revenue act of 1917, Title II, as construed by the revenue act of 1921, section 1331, the plaintiff, during the calendar year 1917, was affiliated with upwards of sixty other corporations, as determined by the Commissioner of Internal Revenue, including the Illinois corporation of Swift & Company, whose principal office and place of business was then, as now, at Chicago, Illinois.

The corporations so affiliated were engaged as a group in the business of buying cattle, sheep, and hogs and converting these into fresh and cured meats for human consumption, and in the distribution and sale of the same; also, in the distribution and sale of poultry and eggs; in the manufacture, distribution, and sale of lard, butter, cheese, oleomargarine, oleo oil, cottonseed oil, animal feeds, soap, tallow, glue, and fertilizer; in the preparation, distribution, and sale of leather; and in the operation of stockyards and refrigerator transportation lines.

The Illinois corporation of Swift & Company was the parent or principal company of the group within the meaning of the regulations of the Commissioner of Internal Revenue.

III. On April 1, 1918, the parent company, pursuant to the regulations of the Commissioner of Internal Revenue, filed with the collector of internal revenue for the first district of Illinois a return of the consolidated net income and invested capital of the affiliated corporations, as therein named, for the calendar year 1917. This return disclosed a total consolidated war excess-profits tax of $5,246,610.85, of which the sum of $3,447,891.33 was allocated against the parent company and was assessed against said company on November 14, 1918. The sum of $224,340.17 was allocated against the plaintiff and was duly assessed against and paid by it as hereinafter shown.

IV. On or about April 1, 1918, the plaintiff filed a tentative return for the calendar year 1917 on Form 1031 entitled

"Corporation Income Tax Return" and a tentative return for the calendar year 1917 on Form 1103 entitled "Corporation Excess Profits Tax Return," but no tax was assessed on the basis of these returns. In the last-mentioned return it was stated: "This company is a subsidiary of Swift & Company, a corporation of Illinois. Its return for the year 1917 is included in the consolidated return of said Swift & Company filed with the collector of internal revenue, first district of Illinois, at Chicago."

On June 3, 1918, the plaintiff filed a complete corporation income-tax return for the calendar year 1917, disclosing an income tax and excess-profits tax in the amount of $265,-608.83, which was duly paid by the plaintiff on June 26, 1918. Of this amount, $224,340.17 was excess-profits tax assessed against the plaintiff on the basis of the aforesaid consolidated excess-profits tax return for the calendar year 1917 filed by the parent company on April 1, 1918, and the balance was income tax assessed on the basis of the aforesaid return filed by the plaintiff on June 3, 1918.

V. Thereafter, on September 3, 1919, and on July 2, 1920, the Commissioner of Internal Revenue assessed additional income and war excess-profits tax against the parent company in accordance with an agreement among the affiliated corporations. The parent company duly paid the amount of these two additional assessments.

VI. Following the completion of an audit of the aforementioned return, the Commissioner of Internal Revenue, in a letter dated November 27, 1922, notified the parent company of his findings as to the net income and invested capital of the corporations therein named by him as affiliated during the calendar year 1917, and of his findings as to the total amount of income and war excess-profits taxes due from them for that year. The total amount of war excess-profits taxes so found to be due was $12,536,597.55, of which there was allocated against the plaintiff $214,858.41, the difference between that amount and the amount previously assessed against and paid by the plaintiff as stated in Finding III being refunded.

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VII. On or about February 28, 1923, and prior to the expiration of five years from the date when returns for the calendar year 1917 were due, the parent company presented to the Commissioner of Internal Revenue a statement of claim, under oath, for the refund of a portion of the income and war excess-profits taxes theretofore paid by said parent company and the other members of the affiliation for that year. A copy thereof is annexed to the petition as Exhibit A, and by reference made a part of this finding.

VIII. Subsequently, the parent company presented to the Commissioner of Internal Revenue in two parts, each under oath, a statement setting forth in more detail the grounds of the aforesaid claim for the refund of a portion of the income and war excess-profits taxes theretofore paid by said parent company and the other members of the affiliation for the calendar year 1917. The first part, filed September 6, 1923, with a supplement filed December 31, 1923, showed the differences, item by item, between the net income of the several affiliated corporations as claimed by them and as determined by the Commissioner of Internal Revenue in the aforesaid letter of November 27, 1922, and the second part, filed January 30, 1924, showed the differences, item by item, between the invested capital of the several affiliated corporations as claimed by them and as determined by the Commissioner of Internal Revenue in the aforesaid letter of November 27, 1922.

IX. Whereupon the Commissioner of Internal Revenue made a reexamination of the aforesaid consolidated return of net income and invested capital of the affiliated corporations for the calendar year 1917 in connection with their books of account and records, and determined that the amount of war excess-profits taxes that should have been assessed against them for that year was $11,028,364.01 in the aggregate, instead of $12,536,597.55, as previously determined, and that the portion thereof that should have been assessed against the plaintiff, as one of such affiliated corporations, was $196,525.45, instead of $214,858.41, as previously determined, making an overassessment of

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$18,332.96, from which was deducted $144.56, claimed to be due on account of income taxes, leaving a net overassessment of war excess-profits taxes for the calendar year 1917 of $18,188.40.

X. In a letter dated April 24, 1926, this overassessment, together with similar overassessments of war excess-profits taxes for the calendar year 1917 found to have been made against others of the affiliated corporations, was reported by the Commissioner of Internal Revenue to the parent company, with notice, however, that such overassessments would not be certified for payment, for the reason that no separate claims for the refund of war excess-profits taxes for the calendar year 1917 were filed by the affiliated corporations individually within five years from the date when returns for that year were due, or within four years from the date when the tax was paid, and that the aforesaid claim filed by the parent company on or about February 28, 1923, was insufficient.

XI. Thereafter, to wit, on September 3, 1927, the plaintiff and the other corporations against whom overassessments of war excess-profits taxes for the calendar year 1917 had been determined, but to whom no refunds had been made, filed individual claims for refund, in which the statement is made that these claims are filed for the purpose of amending the original claim for refund filed by the parent company. The amount so claimed by the plaintiff was $18,188.40, being the amount of the overassessment against it of war excess-profits taxes for the calendar year 1917, as found by the Commissioner of Internal Revenue. A copy of the claim so filed by the plaintiff is annexed to the petition as Exhibit B, and is by reference made a part of this finding.

XII. No decision on the individual claim for refund filed by the plaintiff has been rendered by the Commissioner of Internal Revenue, nor has any portion of the aforesaid overassessment been refunded or credited to the plaintiff.

XIII. If the claim for refund as originally filed on or about February 28, 1923, by the parent company, or if said claim as originally filed considered in connection with the

claim filed on September 3, 1927, is sufficient in law, there is due and owing the plaintiff on account of overpayment by it of war excess-profits taxes for the calendar year 1917 a refund of $18,188.40, together with interest at the rate of six per cent per annum for the period provided by law.

The court decided that plaintiff was entitled to recover $18,188.40, with interest from June 26, 1918.

GREEN, *Judge*, delivered the opinion of the court:

This is a suit to recover an overpayment of excess-profits taxes for the year 1917. There is no dispute but that the overpayment was made as alleged for the taxes that were not in fact or law due.

The plaintiff, Swift & Company of West Virginia, is a subsidiary of Swift & Company of Illinois, but the taxes sought to be recovered back were paid by the plaintiff. Within the period fixed by the statute of limitations, the parent company, Swift & Company of Illinois, filed a claim for refund in accordance with and upon a form furnished by the Internal Revenue Bureau. This claim stated the name of the taxpayer to be Swift & Company (of Illinois) and affiliated companies, and said that the statement therein contained was made " on behalf of the taxpayer named." The blank form was filled as far as space permitted and a statement was made that full details were being filed with the revenue bureau in Washington with respect to the audit for the year 1917. Thereafter, in December, 1923, and in January, 1924, the parent company filed statements setting forth in detail the ground of the aforesaid claim for refund of a portion of the income and war excess-profits taxes paid by the parent company and the other members of the affiliated group for the year 1917. Upon the information so furnished, the Commissioner of Internal Revenue made a reexamination of the consolidated return of net income and invested capital of the affiliated corporations, which had been made for the year 1917 in connection with their books of account and records, and found and determined that these companies had been overassessed in the aggregate

of more than a million dollars, and that a net overassessment of war excess-profits taxes had been made against the plaintiff for 1917 of $18,188.40. In a letter dated April 24, 1926, the commissioner reported these overassessments to the parent company with notice, however, that such overassessments would not be certified for payment for the reason that no separate claim for the refund of the war excess-profits taxes for the year 1917 had been filed by the affiliated corporations within the time prescribed by the statute of limitations, and that the claim filed by the parent company on or about February 28, 1923, was insufficient. On September 3, 1927, the plaintiff filed an individual claim for refund for $18,188.40, being the amount which the commissioner had found to be overassessed against it, and stating therein that the claim was filed for the purpose of amending the original claim for refund filed by the parent company; but the commissioner has never recognized this claim, and the defendant now insists that the claim originally filed by the parent company was insufficient, that in any event the claim must be made by the plaintiff itself, and that no such claim was made until after the statute of limitations had expired. The plaintiff, on the other hand, contends that the original claim was sufficient, and even if not, that it was full and complete when the parent company filed its supplemental statements. Also, as the original claim was filed on behalf of the parent company and the affiliated companies, the individual claim filed by plaintiff related back to the original claim filed by the parent company and was a proper amendment thereto.

The question involved in the case is whether a claim filed by a parent company on behalf of a subsidiary can be treated as a claim filed by the subsidiary within the meaning of the law.

Section 252 of the revenue act of 1921, 42 Stat. 268, among other things provides that no overpayment of taxes for the year 1917, "shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer." Construing this literally, we find that no claim

was filed by the *taxpayer* until after the expiration of the period in limitation. But courts often find that to construe a statute literally is to destroy the spirit of it, and also have always held that the law as a whole which pertains to the subject matter must be taken into consideraion in determining its proper construction and application. Also the Supreme Court has held that in this connection the practice of the department may be considered.

The revenue act of 1917, 39 Stat. 1000, did not expressly provide for the filing of consolidated returns by parent corporations for affiliated groups, but imposed a tax upon individual corporations. The Commissioner of Internal Revenue was, however, authorized to make regulations for the enforcement of the act, and pursuant to the authority so granted, the commissioner promulgated regulations which provided that under certain circumstances two or more corporations would be deemed to be affiliated and required to file a consolidated return. The affiliated group complied with these regulations and a consolidated return was filed by the parent company, Swift & Company of Illinois. In the *United States Refractories Corporation case*, 9 B. T. A. 671, 688, the Board of Tax Appeals held that where a consolidated return was required and made—

"It follows that for the purpose of the taxing statutes the two corporations are to be treated as one and their separate, independent corporate identities are merged into the new taxable entity thus created. * * * All matters affecting the tax liability of either or both members of the group are to be considered in determining the tax liability of the new taxable entity."

If this rule be correct, it would seem that the original claim filed by the parent company was the proper method of submitting the claim for refund because it took into consideration all matters affecting the liability of any of the group of affiliated corporations. It may be also said that if a consolidated return is required and made of the taxes for all of the affiliated corporations, why may not a consolidated claim for a refund be made, especially when it is necessary to take into consideration in determining whether a refund should be granted, all questions relating to the liability of the

other affiliated corporations. Clearly the Government would not be prejudiced by such a proceeding, but, on the contrary, the whole matter would be better presented thereby. This view finds support in other decisions of the Board of Tax Appeals. In the *Farmers Deposit National Bank and Affiliated Banks case*, 5 B. T. A. 520, 528, it was held that the affiliated corporations "were, for the purposes of the income and profits taxes, one and the same taxpayer"; and in the case of *G. M. Standifer Construction Corporation*, 4 B. T. A. 525, 550, a claim filed by the parent company for an amortization deduction on the cost of facilities constructed by an affiliated company was held proper, although the objection was raised that a separate claim should have been filed on behalf of the corporation. This decision was acquiesced in by the Commissioner of Internal Revenue.

The Treasury Regulations of 1929, with reference to consolidated returns of affiliated corporations, now expressly provide that—

"The parent corporation shall be for all purposes, in respect of the tax for the taxable year for which a consolidated return is made or is required, the agent of each corporation which during any part of such year was a member of the affiliated group, duly authorized in the name of the parent to act for and represent each such corporation in all matters relating to such tax; * * * the parent will file claims for refund or credit; * * *." (Art. 16, Reg. 75.)

There is nothing in the statute which establishes any new principle with reference to this matter. The new regulation simply requires what would have been the correct practice under the former statute, there being no regulation on this matter under the statutes in force at the time the original claim for refund was filed. The Senate committee, in reporting on the provision for consolidated returns, said in substance that it was adopted for the purpose "of taxing as a business unit what in reality is a business unit." The Joint Committee on Internal Revenue Taxation presented in 1927 an elaborate report which was supervised by an advisory committee composed of prominent experts in taxation from various parts of the country, and this report, in Volume III

thereof, shows that a claim for a refund is always considered by the Revenue Bureau in connection with the original return on which the tax was assessed; and while the report does not expressly so state, it is evident that both the committee experts and the bureau treated a refund claim in the same manner, as an amendment to the original return.

We think, therefore, that the original claim was proper as an amendment to the original consolidated return, and in connection with the statements subsequently filed by the parent company setting out the claim in more detail, was sufficient. The Commissioner of Internal Revenue had no difficulty whatever after the filing of these papers in determining that the plaintiff was entitled to the refund. If there was any insufficiency in these statements of the parent company taken together, it was, we think, merely one of form and could be cured by such an amendment as the plaintiff subsequently filed, although it was made after the expiration of the period of limitations.

It should be noted also that when the Government required a consolidated return to be filed, and also presented to the interested parties a form of a claim for refund which permitted the claim to be filed on behalf of more than one party, it naturally led the parent company and the plaintiff to believe that the proper method was to file a consolidated claim for refund as well as a consolidated return. As was said in *Tucker* v. *Alexander*, 275 U. S. 228, the statute and the regulations "are devised, not as traps for the unwary but for the convenience of Government officials in passing upon claims for refund and in preparing for trial." They should undoubtedly be so construed, if it can be fairly done, as to protect the Government in the collection of its revenues and within reasonable bounds enable it to review tax claims in a convenient and practical manner. But here it can not be said that there was anything inconvenient and impracticable presented by the method which has been pursued by the plaintiff. On the contrary, if anything, the manner in which it was done was best adapted to a correct determination of the tax liability in question.

We conclude on the whole that plaintiff's claim for refund has been properly presented, and that it accordingly is en-

titled to recover the amount which the commissioner found it had been overassessed and had paid. Judgment will be entered accordingly.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

FIRST STATE BANK OF STAFFORD, KANSAS, v. THE UNITED STATES

[No. H-490. Decided March 18, 1929]

On the Proofs

Income-tax deductions; worthless debts; action of board of directors.—Where bonds held by a bank are ordered by the board of directors thereof during the taxable year to be charged off and they are at that time worthless, the action of the board is of the same force and effect as a bookkeeping entry, and the bank is entitled to their deduction in the income-tax return for that year as a bad debt.

The Reporter's statement of the case:

Messrs. Albert A. Jones and *Don F. Reed* for the plaintiff. *Hatch & Reed* were on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, the First State Bank of Stafford, Kansas, is now and at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of Kansas, having its principal office for the transaction of business in the city of Stafford, State of Kansas.

II. On March 15, 1920, the plaintiff filed its corporation income-tax return for the year 1919, showing a tax of $2,340.09 which was paid between March 15, 1920, and December 31, 1920. Thereafter the Commissioner of Internal Revenue, upon a readit of the plaintiff's returns and

books, increased the net income shown by its return for the year 1919, and by reason thereof found a deficiency in tax of $1,341.69 for said taxable year. The commissioner notified the plaintiff of his determination of said deficiency by letter dated June 26, 1921. On August 22, 1921, the plaintiff filed a claim for abatement of the deficiency tax, and on June 27, 1922, the claim was allowed to the extent of $275.68, and it was further determined that the plaintiff was entitled to a credit of $447.00 as the result of overassessments for the years 1916 and 1917, leaving the amount of $619.01 of the deficiency assessment to be paid. On August 14, 1922, the plaintiff filed a combined claim for refund and abatement in the amount of $2,413.77, claiming therein a refund of $1,794.76, and asking for an abatement of $619.01. This claim for refund and abatement was rejected by letter of November 1, 1922. On January 8, 1923, the plaintiff paid $619.01 of the tax, and interest in the amount of $12.38, being the amount due after the commissioner applied the $447.00 credit above mentioned. On August 20, 1923, the plaintiff filed another claim for refund in the amount of $2,426.15, including the $619.01, which claim was rejected on December 7, 1923. On March 15, 1926, the plaintiff filed a further claim for refund in the amount of $2,426.15, including the $619.01, which claim was rejected on June 11, 1926.

III. In its income-tax return for the calendar year 1919, the plaintiff claimed as a bad-debt deduction $3,000.00 of William Galloway Company bonds hereinafter mentioned, and in its return for the year 1920, filed April 15, 1921, the plaintiff claimed a further deduction as bad debts an additional $3,000.00 of William Galloway Company bonds. Upon a reaudit of the plaintiff's returns and books the $3,000.00 bad-debt deduction for each of the years 1919 and 1920 was disallowed by the commissioner, resulting in the deficiency assessment above mentioned to the extent of $619.01, the balance of the deficiency resulting from other adjustments. After the deficiency assessment was made the plaintiff contended that the entire $6,000.00 of William Galloway Company bonds should be allowed as a bad-debt deduction for

the year 1919. The facts relating to the above-mentioned bonds claimed as a bad-debt deduction are as follows:

On April 27, 1918, the plaintiff bought three $2,000.00 notes of the William Galloway Company of Waterloo, Iowa, of even date due the 29th of August, September, and October, 1918. On December 3, 1918, the plaintiff took as a renewal of said notes, two $3,000.00 notes of said company dated November 16, 1918, and due February 16, 1919. After said latter notes became due and prior to October 3, 1919, the plaintiff accepted, in lieu and in settlement of said notes, six general refunding mortgage bonds dated July 1, 1919, and due July 1, 1926, numbered serially 226, 227, 228, 229, 230, and 231, secured by a second mortgage on the assets of said company, the interest to be paid out of the income of said company. No part of the principal or interest of said bonds was ever paid to the plaintiff. On October 3, 1919, a meeting of the board of directors of the plaintiff bank was held and the following notation was placed in the minutes of said meeting:

"The matter of Galloway bonds was discussed and it was voted that $3,000.00 of said bonds be at once charged to undivided profits account and the remaining $3,000.00 be charged from the earnings of the last quarter of 1919."

IV. The reason given by the Commissioner of Internal Revenue for the disallowance of the bad debt deduction above mentioned was stated by him, in his letter rejecting the claim for refund and abatement, in substance as follows:

It is the opinion of this office that the loss in question did not represent a closed and completed transaction in 1919, and therefore can not be allowed as a deduction of worthless debts; neither can a loss be allowed on the exchange of the short-term paper for the second-mortgage bonds. It is evident from the information submitted that the bonds received in exchange have no market value; article 1564, Regulations 45, provides that, if the property received in exchange is substantially the same or has no market value, no gain or loss is realized.

V. During the year 1924, the holders of the first-mortgage bonds brought an action to foreclose their mortgage which

resulted in a final liquidation of the William Galloway Company, and the holders of the second-mortgage bonds, of which plaintiff was one, received nothing in the final liquidation.

The court decided that plaintiff was entitled to recover $619.01, with interest.

MEMORANDUM BY THE COURT

It appears from the agreed statement of facts that in the year 1919, the plaintiff held certain bonds in the amount of $6,000.00, which the commissioner admits to have then had no market value, and were in fact worthless as shown by the result of subsequent endeavors to realize something upon them.

The controversy in the case is as to whether plaintiff should have been allowed a deduction of $6,000.00 for bad debts on account of these bonds in its income-tax return for 1919. There is no dispute but that they were worthless. The principal contention on behalf of the defendant is that the stipulation does not show that they were worthless in 1919, or that they were charged off in that year. It must be admitted that the stipulation is rather indefinite; but the admission of the commissioner that they had no market value in 1919, taken together with the fact that efforts subsequently made to collect them proved unavailing, we think is sufficient to show that they were worthless in 1919. We think also that the action of the board of directors of the bank on October 3, 1919, directing in substance that the amount of the bonds be at once charged off, is of the same force and effect as an entry upon the books of the bank making the charge in the ordinary form.

There is no dispute as to plaintiff's being entitled to a refund of $619.01 if the bonds are shown to be worthless and charged off in 1919. Our conclusion on these points requires that judgment be entered for the plaintiff for said amount, and it is so ordered.

ARTHUR L. LEMON *v.* THE UNITED STATES

[No. D-558. Decided April 1, 1929]

On the Proofs

Army pay; "officers selected for elimination"; discharge with year's pay.—The honorable discharge of a captain in the Army and his appointment as first lieutenant is a reduction in rank and not an elimination entitling him under the statute to a year's pay, nor does his refusal to accept the appointment as first lieutenant bring him within the statute.

The Reporter's statement of the case:

Mr. William D. Harris for the plaintiff. *Mr. Frank Davis, jr.*, and *Palmer, Davis & Scott* were on the brief.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. On November 18, 1922, the plaintiff, being a captain in the United States Army, was by direction of the President honorably discharged from that office and appointed a first lieutenant.

II. The plaintiff declined to accept his said appointment as first lieutenant, and requested that the board of general officers be asked to reconsider his case, and also requested discharge with one year's pay. The Secretary of War advised him that reconsideration was prohibited, and his discharge as a captain went into effect.

III. After receiving final pay on discharge as captain for services and subsistence allowance, the plaintiff in due form and time made a claim for the allowance of a year's pay, which would amount to $2,520, and has not been paid.

IV. In 1922, when on duty as an officer of the United States, the plaintiff was not assigned the public quarters to which he was entitled, and in lieu thereof should receive $181.33, which has not been paid to him.

V. Plaintiff, on his discharge from the Army, did not receive the travel pay to which he was entitled and actual expenses amounting to $85.88, which has not been paid.

Syllabus

The court decided that plaintiff was entitled to recover $267.21.

GREEN, *Judge*, delivered the opinion of the court:

The facts are agreed upon and it is also conceded that the plaintiff is entitled to recover $181.33 on account of not receiving the quarters to which he was entitled, and also $85.88 for travel pay and expenses. The only question in the case is whether he was entitled to a year's pay on being discharged.

The act under which plaintiff was discharged, among other things, provides that—

"Officers selected for elimination of less than ten years' commissioned service may, upon recommendation of the board herein provided for, be discharged with one year's pay." (42 Stat. 722.)

We do not think that the plaintiff can be said to have been "selected for elimination" within the meaning of the law. The elimination referred to in the statute is the action of the Government through a board provided for that purpose. This board did not eliminate the plaintiff from the service. It merely reduced him in rank. He eliminated himself by refusing to accept the offered commission of first lieutenant.

It follows that the plaintiff's claim for one year's salary should be dismissed, and that judgment should be rendered in his favor for the amount conceded to be due him on account of quarters and travel pay and expenses. It is so ordered.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

NANNIE M. CLARK v. THE UNITED STATES

[No. C-1084. Decided April 1, 1929]

On the Proofs

Eminent domain; just compensation; leasehold interest.—Where the land itself is taken by the Government under the power of eminent domain, the taking includes a leasehold interest therein

Reporter's Statement of the Case

for which the lessee is entitled to just compensation. See *Vandiver et al.* v. *United States*, *ante*, p. 125, and *Julian S. Smith et al., trustees*, *ante*, p. 252.

The Reporter's statement of the case:

Mr. Horace S. Whitman for the plaintiff. *Mr. Stevenson A. Williams* was on the briefs.

Mr. William W. Scott, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Spesutia is the name of an island in the west side of Chesapeake Bay, Harford County, Maryland, just south of the mouth of the Susquehanna River. Spesutia Island contains approximately 1,900 acres of land. Title to all of it was formerly in one owner, but many years previous to October, 1917, it was divided into three separate farms, namely, the Lower Island Farm, the Middle Island Farm, and the Upper Island Farm. The Lower Island Farm contains 970 acres, more or less, and is at the southern end of the island and 35 acres on the mainland side of Spesutia Narrows. For many years previous to the time of his death the Lower Island Farm was owned by one Robert H. Smith, who departed this life testate on the 11th day of September, 1915. By the terms of his last will and testament the said Robert H. Smith devised and bequeathed said farm to Julian S. Smith, Chapman S. Clark, and Frederick Von Kapff, subject to the use thereof for four years from the date of his death, by his daughter Nannie M. Clark, in trust to divide, apportion and assign, pay over, and convey to the beneficiaries named in his will. The said Frederick Von Kapff retired as trustee previous to the time of the filing of this action, leaving as the sole trustees, under the will, Julian S. Smith and Chapman S. Clark.

The Middle Island Farm contained approximately 350 acres in the center of Spesutia Island, and was in October, 1917, owned by Annie C. Vandiver, Dorothy C. Vandiver, and Robert M. Vandiver.

The Upper Island Farm, containing approximately 500 acres at the northern end of Spesutia Island, was in October,

1917, owned by a corporation, the stock of which was owned and controlled by clubmen and sportsmen residing in New York City and elsewhere, and was used by them as a game preserve and hunting ground. Each of the farms extended across the island from the Chesapeake Bay on the one side to a channel of water about nine hundred feet in width, known as Spesutia Narrows. The Lower and Middle Farms on Spesutia Island had for more than one hundred years been cultivated and were very fertile and highly productive. Aberdeen was the nearest town and railroad point to the island, and from 1816 to 1917 access to the island had been by public road to a private road over the 35 acres on the mainland belonging to the owners of the Lower Island Farm, thence to the mainland side of Spesutia Narrows to a landing on the said lands belonging to the owners of the Lower Island Farm, thence by ferry across the Narrows, and thence by a private road running from one end of the island to the other, through the three farms. Since 1816 the owners of the Lower Island Farm had been the owners of the fee simple title of thirty-five acres of land more or less on the mainland opposite the northwestern corner of Spesutia Island, consisting of thirty acres of land on Woodpecker Point, and a road one mile long leading therefrom to the public county road. In the year 1816 one Robert Smith, who was the then owner of the Lower Island Farm on Spesutia Island, acquired the thirty-five-acre tract on the mainland opposite the northwestern corner of Spesutia Island and the road leading therefrom to the public road, by deed, at which time the said Robert Smith made the following declaration in writing, and recorded the same, with the deed, in the land records of Harford County:

"Mem. All the lands and tenements contained in this deed are held by me for the use and benefit of Benedict W. Hall, Edward G. Williams, and Samuel Smith, their respective heirs and assigns, as proprietors of the several parts of Spesutia Island so that the several proprietors of said island may at all times have the free use of the same. As witness my hand this thirteenth day of August in the year eighteen hundred and sixteen.

"R. SMITH."

For more than one hundred years previous to October, 1917, the owners of the lands on Spesutia Island, jointly with the county commissioners of Harford County, Maryland, maintained for their use a ferry, which was operated from the Upper Island Farm to the mainland, and maintained a residence on the said 35 acres on the mainland suitable for a home for the ferryman and containing rooms for the accommodation of the inhabitants of the island and their friends. They also kept and maintained on the mainland stables sufficient to accommodate the horses owned by the inhabitants of the island, and in later years maintained a garage building for automobiles and other vehicles. From 1816 to October, 1917, the thirty-five acres on the mainland, and the roadways above mentioned, together with the ferry operated across Spesutia Narrows, were used by the inhabitants of the island, including plaintiff in this case, and her grantors, and was the principal means of ingress and egress to and from their lands to Spesutia Island for vehicular traffic and the principal means for all purposes. Occasional access was had to the island by boat from Havre de Grace, a distance of six miles. The ferryboat, maintained by plaintiff and the other owners of the land on Spesutia Island, was of sufficient capacity to enable plaintiff and the other owners to remove all of their crops and livestock from the island farms to the place of market. In the summer time when the weather was good threshing machinery and other heavy machinery were taken to the island on the ferryboat. In the wintertime when the Narrows were frozen over, and when the water was very rough, the inhabitants of the island could and did occupy rooms in the ferryhouse maintained on the mainland until such times as they could cross on the ferry. At such times they could and did leave their horses and automobiles in the buildings maintained by them on the mainland for such purpose.

II. Pursuant to the terms of the will of Robert H. Smith, deceased, the trustees, Julian M. Smith and Chapman S. Clark, leased to plaintiff, Nannie M. Clark, for the terms of four years from the 11th day of September, 1915, the Lower Island Farm on Spesutia Island, excepting therefrom the

fish and game privileges attached thereto. In October, 1917, plaintiff, Nannie M. Clark, was in possession of the said farm, under said lease to her, for the unexpired term of two years.

III. On October 6, 1917, the Sixty-fifth Congress of the United States passed an urgent deficiency appropriation act (40 Stat. Chap. 79, page 345, 352, etc.) providing for the purchase of a proving ground and the payment of damages and losses resulting from the taking over of land for the proving ground. The act further provided:

"That if the land and appurtenances and improvements attached thereto, as contemplated under the foregoing appropriation, can not be procured by purchase, then the President is hereby authorized and empowered to take over for the United States the immediate possession and title, including all easements, rights of way, riparian and other rights appurtenant thereto, or any land selected by him to be used for the carrying out of the purpose named in the aforesaid appropriation. That if said land and appurtenances and improvements shall be taken over as aforesaid, the United States shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the persons entitled to receive the same, such persons shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum, as, added to the said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. Upon the taking over of said property by the President as aforesaid the title to all such property so taken over shall immediately vest in the United States: *Provided further*, That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to the expenditures authorized hereunder."

On the 16th day of October, 1917, pursuant to the said act of Congress, the President of the United States issued a proclamation (40 Stat. part 2, page 1707) declaring certain lands in Harford County, Maryland, to be necessary for the establishment of a proving ground, which said lands in-

cluded all the lands above referred to on the mainland and on Spesutia Island. The proclamation further provided:

"I do further order as to any land and appurtenances and improvements, attached thereto, lying within the limits described above, which can not be procured by purchase on or before October 20, 1917, that immediately thereafter possession and title, including all easements, rights of way, riparian and other rights appurtenant thereto, may be taken on behalf of the United States by the Secretary of War, or his duly accredited representative or representatives, for use for the purposes specified in the said act of Congress, subject to the provision of the said act as to compensation to be paid therefor."

IV. In the month of October, 1917, some officers of the United States Army visited Spesutia Island and called at the home of Nannie M. Clark on said island, stating that they were there to advise her and the trustees that the Government of the United States had taken over Spesutia Island, and directed them to vacate therefrom and deliver possession thereof to the United States on or before the 1st day of December, 1917. Plaintiff immediately verified the statements made by said officers by consulting with the commanding officer of the proving ground and immediately thereafter accepted the said orders to vacate.

V. Thereafter on the 14th day of December, 1917, the President of the United States issued a second proclamation (40 Stat., part 2, page 1731) whereby the President of the United States took over for the United States all that tract of land therein described for the purpose of establishing a proving ground, thereafter known as the Aberdeen Proving Ground, in Harford County, Maryland. This proclamation contained the following language:

"This proclamation supersedes the proclamation issued on the 16th day of October, 1917, authorizing the Secretary of War to take over the lands above described, together with other lands, which prior proclamation, in so far as it is inconsistent with this proclamation, is hereby revoked."

All persons residing on the lands taken over were notified in the proclamation to vacate the same by January 1, 1918, and all owners of the land and improvements taken over

were notified to appear before a commission and present their claims for compensation.

The lands taken over by the President by the last said proclamation did not include the Lower Island Farm on Spesutia Island, or any part of Spesutia Island, but did include the mainland terminal of the ferry and all of the land including the road described as aforesaid on the mainland, which was the main means of ingress and egress other than by water from the town of Havre de Grace to and from the island.

VI. Immediately subsequent to the date of the second proclamation of the President of the United States, the Government took over approximately 30,000 acres of land, covered by said proclamation, and began the establishment of a proving ground thereon. The limits of the proving ground reserve included the thirty-five acres of land on which were located the private road, the ferryhouse and other buildings heretofore mentioned, and a part of Spesutia Narrows. Immediately following the establishment of the proving ground on the land that was taken over by the Government, the buildings used by plaintiff and other inhabitants of the island on the mainland were torn down and destroyed. Plaintiff and the other inhabitants were and have been since said time refused the right to maintain the ferry on the Government's lands, as theretofore maintained, and the Government also refused plaintiff and the other inhabitants of the island, together with their employees and guests, the right to use without restriction that part of the private road within the limits of the proving ground except at the will and by the permission of those in authority at the proving ground. Since the day and date that the Government took over the lands and established the proving ground thereon all persons desiring to go to Spesutia Island are stopped at the limits of the proving ground by sentries, and if the noncommissioned officer in charge of the gate deems it proper the person is given a pass directing him to appear at the administration building within twenty minutes, where he is required to explain the purpose of his visit, and if such explanation is satisfactory to the officer in charge, he is given a pass, not as a matter of right, but at the will of the said officer in charge, to go to the island, but must report to the administration building

for another pass before being allowed to leave the proving ground, on his return from the island. All baggage, packages, bundles, merchandise, etc., are, by regulations promulgated by the commandant of the proving ground, required to be taken to the administration building, opened and inspected by the military authorities before a pass will be issued allowing anyone to take baggage, packages, bundles, or merchandise through or from the proving ground.

The Government has built and constructed roadways over and across the proving ground, some of which roadways are built of concrete and others of macadam. One of these roadways leads from near the administration building in the proving ground to the site of the ferry terminal. The Government will not permit heavy machinery of any kind to be taken over said roadways.

In the year 1918 the United States declared Spesutia Narrows and a part of Spesutia Island, including a large part of the plaintiff's lands, a danger zone from gunfire and aerial bombs from the United States proving ground, and published a map showing the said danger zone in the newspapers of Baltimore City and Harford County, Maryland, and through the same means warned the public, including the plaintiff, not to enter the said zone. When plaintiff and other persons pass through the proving ground to the island they have to pass through an area on the mainland declared to be a danger zone because of the flight of aeroplanes carrying bombs and other explosives. The United States established and operates upon the lands taken over for the Aberdeen Proving Ground a testing station for guns and established and maintains a flying field thereon for the training of aviators and the testing of aeroplanes and aerial bombs for war purposes, which training and testing includes the carrying and dropping of bombs, flares, and other dangerous devices. Since the establishment of the proving ground, defendant's officers and enlisted men, operating aeroplanes, have at intervals operated aeroplanes carrying bombs and other explosives over plaintiff's leased farm and have repeatedly operated aeroplanes carrying such bombs and explosives over Spesutia

Narrows. One bomb was dropped near plaintiff's barn. It does not appear from the testimony in the record just how frequently aeroplanes loaded with bombs have been operated over Spesutia Island. Such aeroplanes were operated over Spesutia Narrows almost daily.

From time to time the officers of the United States Army have fired shells from antiaircraft guns over and on the Lower Island Farm on Spesutia Island, several of which shells have burst on said land. One shell fired from a gun by defendant's officers burst in very close proximity to the front porch of the house occupied by plaintiff and her family.

In a few instances flares have fallen from aeroplanes flying over said farm. One flare fell in flames within a few feet from the front porch of the home of Nannie M. Clark.

Subsequent to the giving of notice to vacate, as heretofore mentioned, some enlisted men, in charge of a United States Army officer, entered upon the Lower Island Farm and cut several trees in furtherance of the Government's plan to use said farm.

Due to lack of access to Spesutia Island it has been since the establishment of the proving ground an impossibility for plaintiff to operate the farm in a profitable manner.

On account of aeroplanes loaded with bombs and other explosives flying over the Narrows and over the lands on Spesutia Island, and also on account of the fact that the inhabitants of the island have been denied the free right to go to and from the island through the Aberdeen Proving Ground, plaintiff has been unable to keep necessary laborers on the farm to operate same.

VII. At and before the time the Government took possession of the thirty-five acres of land on the mainland, and the private right of way thereon, plaintiff's leasehold was of the value of $2,000 a year or of a total value of $4,000 for the unexpired term of the lease. Subsequent to the taking of the thirty-five acres of land on the mainland, and the private right of way thereon, plaintiff's leasehold was of the value of $300 a year, or $600 for the unexpired term of the lease.

VIII. During the time that plaintiff, Nannie M. Clark, occupied said farm under her lease, her husband, Chapman S. Clark, operated it.

IX. Shortly after the Government, through the Secretary of War, had established the Aberdeen land purchasing commission for the consideration of claims presented to it for compensation for the land described in the President's proclamation and damages and losses to persons, firms, and corporations resulting from the procurement of said land, the plaintiff, Nannie M. Clark, and her husband, Chapman S. Clark, presented to said commission their joint claim for damages resulting to herself and her husband from the taking of said land. On February 1, 1918, said commission made an award to Chapman S. Clark of $1,000 "on account of inconvenience suffered by you on account of the taking of the right of way leading to Spesutia Island," and Chapman S. Clark was so notified. On February 14, 1918, said commission made a joint award to the plaintiff, Nannie M. Clark, and her husband, Chapman S. Clark, in the sum of $2,000 for "all loss and damage sustained" by them, "except that an award of $100 per acre was made for the land belonging to the estate of Robert H. Smith, within the bounds of the proving ground," and Chapman S. Clark was so notified. Neither award was accepted. The plaintiff then separated her claim from her husband's claim and filed an amended claim with the land commission. The land commission was abolished before any definite action was taken by it on said separate claim. Plaintiff's claim was afterwards presented to the War Department Claims Board, appraisal section, which board advised the plaintiff that it had no jurisdiction in the matter.

X. In June, 1920, the trustees under the will of Robert H. Smith, deceased, sold all of the Lower Island Farm on Spesutia Island for $50,000. Approximately 500 acres thereof were sold to Converse and Monell for $35,000 and the remainder, 470 acres, was sold to plaintiff for $15,000. In the deeds to Converse and Monell and to plaintiff the land conveyed was described by metes and bounds, and no acre-

age was mentioned therein. On July 21, 1921, plaintiff sold 162½ acres of the land to H. Arthur Stump for $9,200, leaving plaintiff the owner of approximately 307½ acres, which she sold about June 1, 1928, for $90,000.

The court decided that plaintiff was entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

The plaintiff was a lessee of certain land on Spesutia Island in the State of Maryland. Acting by virtue of authority granted by the act of Congress of October 6, 1917, 40 Stat. 352, the President, through the Secretary of War, on December 14, 1917, took certain property, thereby depriving the plaintiff of ingress and egress to and from other property of which plaintiff held a lease.

The liability of the Government as and for a taking under the same circumstances was passed upon by this court in the case of *Julian S. Smith et al* v. *United States*, decided March 11, 1929 [*ante*, p. 252], involving the taking of the land itself, and damages were allowed the plaintiff Smith in that case to the value of the property taken, and for injury by cutting off communication with the property under lease here by the plaintiff.

The question of the liability of the Government to the plaintiff for injury to the value of her leasehold has been settled. See *Duckett* v. *United States*, 62 C. Cls. 781, 266 U. S. 149; *Phelps* v. *United States*, 274 U. S. 341; and *Chapman S. Clark* v. *United States*, 59 C. Cls. 940, reversed by the Supreme Court without opinion. So that the only remaining question is the amount of damage to the plaintiff's leasehold interest which, according to the findings, is $3,400, for which, with interest from December 14, 1917, judgment should be entered, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

HERBERT DU PUY v. THE UNITED STATES

[No. E-209. Decided April 1, 1929]

On the Proofs

Settlement of taxes and penalties; provision against use of same as admission or evidence.—A controversy having arisen between a taxpayer and the Commissioner of Internal Revenue as to the validity of deficiency assessments of taxes and penalties thereon, a settlement was entered into with the proper authorities by the express terms of which, upon the payment of designated amounts, the taxpayer was to be relieved "from any and all claims for taxes, penalties, and liabilities of any nature whatsoever under existing law" for the taxable period involved. It was further provided therein that the same should not be used as an admission by or offered in evidence against the taxpayer in any future action or proceeding. *Held*, that the provision excluding the transaction from use as an admission or evidence, if of force, would negative the settlement which it was the intent of the parties to effect, and it must therefore be rejected for repugnancy.

Same; protest.—Where a taxpayer, in order to avoid the trouble and expense of a lawsuit, signs a settlement of taxes and penalties and there is no direct evidence of bad faith, threats, or intimidation on the part of the Government officials, it does not amount to intimidation or duress, and where the taxpayer had the alternative of paying the taxes and penalties demanded and lodging protest with the proper officials, without signing a settlement, he must be held to have paid the agreed amount without protest.

The Reporter's statement of the case:

Messrs. Selig Edelman and *Martin W. Littleton* for the plaintiff. *Mr. H. B. McCawley* was on the brief.

Messrs. John McCann and *Charles R. Pollard*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. In 1908 Herbert Du Puy and Amy Hostetter Du Puy, his wife, plaintiff in the companion case No. E–208 now pending in this court, concluded to provide their four children

with independent financial resources and incomes before the death of their parents. Mr. and Mrs. Du Puy had for many years been resident of Pittsburgh, Pennsylvania, and both were very wealthy. They contemplated the transfer of certain of their real and personal property directly to their children by way of gift, and the transfer of other properties and securities to corporations to be organized, and gifts to their children of stockholdings in those corporations.

II. Between 1908 and 1918 the four Du Puy children, two of whom were sons and two of whom were daughters, were married, and several children were born as issue of their marriages. During that period, including the years 1908 to 1918, Mr. and Mrs. Du Puy transferred directly to their children and grandchildren by way of gift, moneys, securities, and properties of the value of $2,732,205.56. The two sons were named H. Wilfred Du Puy and Charles M. Du Puy. Of the married daughters, one was Mrs. E. D. Merrick and the other became Mrs. McHenry, who died and left a daughter named Amy Du Puy McHenry.

III. In 1908 Herbert Du Puy caused to be organized the corporations known as the Morewood Realty Holding Company and the Lansing Realty Holding Company, and in that year he acquired a substantial stock interest in the Goodwin Sand & Gravel Company. These three corporations are hereinafter referred to in some of the findings as the New York Corporations. During the years of 1908 to 1915, inclusive, Mr. and Mrs. Du Puy transferred to the New York Corporations certain valuable real property situated in New York City, and also transferred certain securities to the said corporations. The properties transferred had a value at the time of the transfers of approximately $5,000,000.00, and were made as a gift without any consideration being received therefor.

During the years of 1917, 1918, and 1919 additional transfers by way of gifts of properties and securities aggregating $11,983,053.72 in market value were made by Mr. and Mrs. Du Puy to the Lansing Realty Holding Company, the Morewood Realty Holding Company, and the Goodwin Sand & Gravel Company.

On June 23, 1921, Mr. and Mrs. Du Puy, acting upon a suggestion from the Bureau of Internal Revenue, executed formal instruments in writing whereby they ratified and confirmed as gifts the transfers of securities and properties made by them during the years 1917, 1918, and 1919 to the New York Corporations.

IV. On May 14, 1917, at a meeting of the board of directors of the Morewood Realty Holding Company, Herbert Du Puy and James C. Ewing, at that time being president and vice president, respectively, a blanket resolution was adopted authorizing the president or vice president, with the concurrence of the secretary and treasurer, to sell, assign, transfer, and deliver moneys, stocks, bonds, mortgages, or other securities, and to execute any contract, agreement, or conveyance deemed necessary and proper without any further action on part of the board of directors. On July 13, 1917, a resolution was adopted to the effect that it was not necessary for a director to be a stockholder of the company. Herbert Du Puy and James C. Ewing were, by a resolution adopted May 28, 1917, authorized to have access to safes in the name of the corporation in the vaults of the Mercantile Safe Deposit Company. Herbert Du Puy was president up to December 15, 1917, and thereafter A. P. Anderson was president until January 4, 1918; Ewing was vice president and Reed was secretary during the year 1917. On May 14, 1917, at a meeting of the board of directors of the Goodwin Sand & Gravel Company, the president or vice president, with the concurrence of the secretary and treasurer of the company, were authorized to make any transfers or sales of personal property. The officers of the Goodwin Sand & Gravel Company, during 1917, were Herbert Du Puy, president; James C. Ewing, vice president; William E. Reed, secretary and treasurer.

V. The Morewood Realty Holding Company and the Lansing Realty Holding Company were each organized with an authorized capital stock of $1,000 divided into ten shares. Originally Herbert Du Puy owned eight shares, H. Wilfred Du Puy one share, and James C. Ewing one share. On October 15, 1908, Herbert Du Puy held one share, his wife seven shares, H. W. Du Puy one share, and Charles M. Du

Puy one share. On May 23, 1912, Herbert Du Puy held three shares, his wife five shares, H. W. Du Puy one share, and Charles M. Du Puy one share. On May 23, 1916, Herbert Du Puy held five shares, his wife three shares, H. W. Du Puy one share, and Charles M. Du Puy one share. On October 23, 1916, Herbert Du Puy held six shares, his wife two shares, H. W. Du Puy one share, and Charles M. Du Puy one share. On May 19, 1917, H. W. Du Puy held three shares, Charles M. Du Puy three shares, Mrs. E. D. Merrick two shares, and Herbert Du Puy, trustee for Amy Du Puy McHenry, two shares. On December 14 James C. Ewing held nine shares and W. E. Reed one share. No authority appears on the books for the transfers to the children or to Ewing and Reed.

On December 15, 1917, Herbert Du Puy wrote a letter directed to the Board of Directors of the Morewood Realty Holding Company offering to purchase 6,440 shares of the capital stock of the company at the price of $1,000 a share, provided the owners of the ten shares in the company then outstanding would contribute to the capital of the company an additional $9,000 in cash. The company was reorganized and a total number of 6,450 shares of stock was issued. Along from December 15 to 20, 1917, Herbert Du Puy issued his checks upon the joint account of himself and wife in the Farmers Loan & Trust Company for $6,450,000, being the price of 6,450 shares at $1,000 each. These checks went to the credit of the Morewood Realty Holding Company with the Farmers Loan & Trust Company; and, as a simultaneous transaction, the Morewood Realty Holding Company issued its check or checks back, which went to the joint account of Herbert Du Puy and Amy Du Puy, his wife. The evidence does not show that any stock of the new denomination under the reorganization was issued on account of giving these checks to either Herbert Du Puy or Amy Du Puy, but 1,611 shares were issued to each of the following-named parties, to wit: H. W. Du Puy, Charles M. Du Puy, Mrs. E. D. Merrick, and James C. Ewing, in trust for Amy Du Puy McHenry, and the accounts of these parties were charged with the price of this stock on the books of the Morewood

Realty Holding Company. Also, Herbert Du Puy and his wife each received two shares, James C. Ewing one share, and William E. Reed one share. These stockholdings continued until July 21, 1918, when the stock held by James C. Ewing, in trust for Amy Du Puy McHenry, was transferred to Herbert Du Puy, as trustee for the same party.

VI. From October, 1908, to November 20, 1911, the stock holdings in the Goodwin Sand & Gravel Company were divided between the Du Puy interests and the Goodwin interests. At the latter date the Goodwin interests were taken over by the Du Puys. From November 20, 1911, to December 24, 1919, 21,680 of the 25,000 shares of the Goodwin Sand & Gravel Company were held by Herbert Du Puy, 3,286 were held by Herbert Du Puy as trustee, 16 shares each were held by H. W. Du Puy and Charles M. Du Puy, and one share each by William E. Reed and James C. Ewing. On December 24, 1919, Herbert Du Puy transferred his 21,680 shares to the Morewood Realty Holding Company, and with that exception the stock ownership as of November 20, 1911, remained unchanged until January 19, 1921.

H. Wilfred Du Puy died July 4, 1920. Charles M. Du Puy died in 1925. After their deaths certificates representing their share holdings in the corporations named were found in their safe-deposit boxes by their respective executors. Since 1924 regular dividends have been paid to and received by the stockholders of record of the Morewood Realty Holding Company, and prior to that time only nominal dividends were paid.

VII. The evidence fails to show that after the year 1913 the Morewood Realty Holding Company and the Lansing Realty Holding Company were engaged in any active business apart from receiving the income from properties that they held or in a few cases the income from real estate or securities sold at a profit. Until January 30, 1913, the Goodwin Sand & Gravel Company was an operating company. On that date it ceased operations and also became a holding company; that is, it engaged in no active business outside of the receipts from its securities and investments, and, like the other companies mentioned, was a company

primarily for investment purposes. In July, 1917, large amounts of securities were transferred by Herbert Du Puy to these companies.

During the year 1908 Herbert Du Puy transferred to the Morewood Realty Holding Company various properties amounting to several million dollars in value. These transfers were entered upon his books, which were kept by himself, as gifts to the corporation without consideration. The corporation credited them to the account of the Morewood Realty Holding Company, which was equivalent to crediting them to the capital account. On November 30, 1909, the items of the capital account representing the value of property transferred to the corporation by Du Puy were transferred from that account on the books of the corporation to Du Puy's credit by a Mr. Kelly, who appears to have been in charge of the corporation's books at that time. There was no authorization for this from the stockholders or the board of directors, and Kelly claims to have made the change because the original entry on the books was meaningless. On the same date interest at six per cent on the value of the property transferred was credited to Du Puy's account amounting to $110,367.80, which was greater than the income on the property transferred to the corporation by Du Puy, making the corporation's books show a net loss for that year. Du Puy's own books, however, continued to treat as gifts these transfers to the corporation.

From March 22, 1910, to May 19, 1917, the stock of the Lansing Realty Holding Company, consisting in all of ten shares, was held, eight shares by Herbert Du Puy, one share by H. Wilfred Du Puy, and one share by James C. Ewing. From May 19, 1917, to December 19, 1917, H. Wilfred Du Puy held three shares, Charles M. Du Puy three shares, Mrs. E. D. Merrick two shares, and Herbert Du Puy, in trust for Amy Du Puy McHenry, two shares; and at about that time the Lansing Realty Holding Company was merged into the Morewood Realty Holding Company.

Prior to October 31, 1912, Herbert Du Puy had transferred a certain mortgage to the Lansing Realty Holding Company. On the date mentioned he withdrew this mort-

gage from that company and gave it to the Morewood Company, which used it in purchasing two apartment houses. This mortgage Du Puy had treated on his books as a gift to the Lansing Realty Holding Company, and that company had entered it upon its books to the credit of Du Puy's account.

Beginning with 1913 interest was no longer credited to plaintiff on balances to his credit, as it had been theretofore, but his account was credited with the value of the property transferred, or his wife's account, according to who held the title to the property transferred.

VIII. The plaintiff loaned to the Morewood Realty Holding Company $1,353,000 on May 8, 1917, which was credited to bills payable. On June 30, 1917, this credit was transferred to the stockholders along with all other credits in the bills-payable account, amounting to a total of $1,584,000, which apparently included credits for other loans made by the plaintiff.

The income on the securities transferred to the Lansing Realty Holding Company for 1917 amounted to $90,149.35. This company loaned to Du Puy in that year $91,300. The Morewood Realty Holding Company had earnings of $172,-550.17 in its special investment account for that year on securities transferred by him and subsequently turned over to his children, and it loaned Herbert Du Puy $200,000 the same year. His personal account was credited with $200,000 by reason of this loan, but he drew only $110,000 that year and the balance in 1918. The total income of the Morewood Realty Holding Company for 1917 and 1918 was $478,491.12. All of these loans were made after the stockholders' account had been credited with the amount in the bills-payable account, as above recited. The testimony does not show when these notes were finally paid, but they were renewed in 1918 and 1919, and the Morewood Company loaned Herbert Du Puy $150,000 in 1919 for one year. The income for 1917 and 1918 of the Goodwin Sand & Gravel Company was $476,263.92 from securities transferred by Du Puy. This company loaned Du Puy in 1917, $182,000 on note or notes renewed in 1918 and 1919, and paid according to the books in October, 1920.

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On all loans made to him by the New York corporations, plaintiff gave notes and paid interest, but neither plaintiff's books nor the books of the New York corporations show that all of this interest was paid when due and prior to the investigation hereinafter described.

IX. On July 1, 1917, the plaintiff was the owner of various warehouses which were under lease to various Moline Plow companies, and on that date, by a written instrument executed by him and his wife, the rentals for the entire term of such leases were assigned to the Morewood Realty Holding Company, and under such assignment there was paid to the Morewood Realty Holding Company, in the year 1918, the sum of $74,156.48, which said company retained and credited to the special income account. At the date specified the account of investment securities was charged with $856,805.02, with an explanatory entry of "rents—Moline Plow Co.," but no deeds were ever made and nothing but the right to collect the rents had been transferred. On December 31, 1917, an entry was made crediting the same account with $856,-804.02, with the explanatory entry of "rents—Moline Plow Co.," this last entry evidently being a correction of the preceding one.

X. In the years 1917 and 1918 securities were transferred by Herbert Du Puy to the Goodwin Sand & Gravel Company valued as follows:

May 31, 1917	$660, 200
February 13, 1918	5, 400
July 15, 1918	35, 850
Total	701, 450

and he was credited in his individual account with that company with the amount thereof. The total of these securities was carried or transferred to the paid-in surplus account December 31, 1920, which extinguished the credit balance to his account at that time.

On January 1, 1918, the books of the Goodwin Sand & Gravel Company show $556,275 credited to bills payable with an explanatory note "balance brought forward from old ledger." Apparently he had had this amount to his credit

upon the books of the company, and an examination of the books of the Morewood Company shows an entry on January 1, 1919, charging bills receivable with the same amount, which would indicate that a note had been given either to Du Puy or the Morewood Company. In any event, that amount in bills payable became the property of the Morewood Company. This entry of January 1, 1919, is on the books of the Morewood Company and is also accompanied by an explanatory entry to the effect that it is "carried forward as a balance from previous account."

The income from the securities which were transferred to the Goodwin Company was credited to what was called the "special income account." At the end of the year this income was transferred to the profit and loss account.

XI. Between September 17 and October 2, 1919, inclusive, Miss E. W. Reed, assistant secretary of the Crucible Steel Company, at Herbert Du Puy's directions, sold 6,385 shares of Crucible Steel common stock. Of this stock, 3,500 shares had been registered in the name of George D. Barrow and 2,885 in the name of James C. Ewing. James C. Ewing delivered the stock to the brokers.

On the Morewood Company's journal for December 31, 1919, an entry appears showing the sale of 3,500 shares of Crucible common stock, "transferred as of sundry dates and sold." In a journal entry of the same date the account of investment securities is debited with $547,072.50, and $266,-012.50 was also debited to investment securities and credited to paid-in surplus. These entries are accompanied with the explanatory memorandum of "to place on the books 3,500 shares of Crucible Steel Co. common stock, at the value shown by the average of the bid and asked price on the dates of registration in the name of George D. Barrow."

The stock was registered in the name of George D. Barrow in the month of May, 1919.

The journal of Herbert Du Puy, of date December 31, 1919, shows a debit to "capital account" of $472,944, and a credit to "Crucible Steel Co. common stock" of the same amount, with the memorandum "recording 6,385 shares of C. S. Co. com. stock given to M. R. H. Co. and G. S. & G. Co. in December, 1918, and during 1919."

This account showed that on January 1, 1919, he had 3,300 shares. The entries in this account show that he was buying and selling this stock. From June 23, 1919, to August 23, 1919, this account showed that he had 6,385 shares. On July 31, 1919, a dividend of $1.50 per share was paid on Crucible Steel stock to the Goodwin Sand & Gravel Company upon 6,385 shares according to its books. On December 31, 1919, an entry was made transferring the dividends on 3,500 of these shares to the Morewood Realty Holding Company with an explanatory memorandum, "by transfer of dividends received August 5, 1919, on 3,500 shares of Crucible Steel Co. belonging to M. R. H. Co."

The photostatic copies of the entries referred to above on the books of the Morewood Realty Holding Company show that they were made in a different handwriting from other entries on the books.

At the same date, on the books of the Goodwin Sand & Gravel Company, similar entries were made in the same handwriting, the identical language being employed. The number of shares sold was 2,885; the value was stated at $211,502.19, the profit at $334,799.16, making a total sale price of $546,301.35.

The entry also shows the stock was registered in the name of James C. Ewing at sundry dates in December, 1918, and June, 1919.

James C. Ewing was actual manager and in active charge of the New York corporations taking care of the corporate interests of Herbert Du Puy. Emily W. Reed became Herbert Du Puy's private secretary about November, 1919. Prior to this date she was an employee of the Crucible Steel Company working for Herbert Du Puy, its chairman. Daniel F. Kelly was in the employ of the Morewood and the Goodwin companies, auditing and supervising the accounting work and in closing the books at the end of the fiscal year. He got all his information from Ewing. The New York Corporations were controlled by the plaintiff.

XII. During the year 1919 the Morewood Realty Holding Company sold 722 shares of stock of the Farmers Deposit National Bank of Pittsburgh, Pa., at a net profit of $16,216.12.

These securities had been purchased on August 29, 1919, with funds of the Morewood Realty Holding Company and were sold for the account of the Morewood Realty Holding Company some time in October, 1919, and the money retained by the Morewood Realty Holding Company. The aforesaid 722 shares of stock did not constitute assets previously transferred by plaintiff to the Morewood Realty Holding Company.

XIII. For a period of ten years prior to 1919 Herbert Du Puy had been chairman of the board of directors of the Crucible Steel Company of America, and during part of that time he had also been its president. In 1919 there was a contest for the control of the corporation, and the shares of common stock of the corporation rose greatly in value. Mr. Du Puy sold much of his stock, and in the fall of the year was replaced as chairman of the board of directors of the company by a person representing the parties who had come into control of the company. In the latter part of the same year the Bureau of Internal Revenue caused an investigation to be made of the income of the company, which was subject to the corporation income tax, and, as a result of that investigation, the company was charged with having made false income-tax returns, and an additional tax was assessed of several millions of dollars and penalties of a large amount. Mr. Du Puy was charged with being responsible for making the returns which were alleged to be false.

A settlement was effected between the Crucible Steel Company and the Bureau of Internal Revenue whereby the additional taxes assessed against the company were paid, and penalties were fixed at an amount approximating the value of the use of the money involved in the additional tax for the period of delinquency. Some time later an indictment was found against Mr. Du Puy, based upon the income-tax return of the Crucible Steel Company, which was found by the Government to be incorrect and which was signed by Mr. Du Puy as president. He was subsequently tried before a jury and acquitted. After the settlement of the income tax of the Crucible Steel Company an investigation was made by Government officials of the personal income-tax returns of

Mr. and Mrs. Du Puy. As a result of this investigation, a letter was sent to Mr. Du Puy, dated February 11, 1920, advising him that an audit of his income-tax returns for the years ending December 31, 1916, 1917, and 1918 indicated that he was subject to additional taxes and penalties for those three years aggregating $3,018,160.99, and that by reason of the fact that his income-tax returns for those years were regarded by the department as false, he had incurred liability for penalties as outlined under the provisions of section 3176, U. S. Revised Statutes, and section 250 of the revenue act of 1918.

XIV. Pursuant to the recommendations and reports of the investigators and the said letter of February 11, 1920, the Commissioner of Internal Revenue, under date of February 11, 1920, assessed additional taxes and penalties as follows:

	Tax	Penalty	Total
Herbert Du Puy	$1, 532, 613. 51	$1, 485, 547. 48	$3, 018, 160. 99
Amy H. Du Puy	61, 700. 94	93, 432. 08	155, 133. 02

Subsequent to such assessments Herbert Du Puy and Amy H. Du Puy sought a reduction in the assessments made against them by filing a claim for abatement and through conferences between their attorneys and representatives of the Bureau of Internal Revenue. These conferences began in August, 1920, and ended just prior to the submission of the compromise offer of November 9, 1920, hereinafter referred to. Two of these conferences were presided over by the Commissioner of Internal Revenue, William M. Williams. The last conference was held in the office of the Commissioner of Internal Revenue. The Solicitor of Internal Revenue, Carl Mapes, Assistant Solicitor S. E. Whitaker, and others attended on behalf of the Government. The interests of the Du Puys were represented by Mr. Lamar Hardy, Mr. Carter Hall, and others.

At these conferences the various items going to make up the income of Herbert Du Puy, the plaintiff in this case, and Amy H. Du Puy, the plaintiff in No. E–208, were discussed, the representatives of the Du Puys claiming in substance that

various items were erroneous. As the conferences progressed the assessments against Herbert Du Puy were reduced on certain items by the Government officials. At the last conference $1,722,016.81 was understood to be the lowest amount which the Government would accept for the taxes, together with $250,000 assessed as a penalty in settlement of the taxes and penalties originally claimed against Herbert Du Puy and Amy H. Du Puy. The $1,722,016.81 fixed as the amount of the taxes was the sum which the counsel and officials acting for the Government considered was actually due. The $250,000 fixed for the amount of the penalties was agreed upon in compromise of the statutory penalties, which were very much larger.

All of this assessment, both of taxes and penalties, was disputed to the end by the representatives of Herbert Du Puy and Amy H. Du Puy. At one of the conferences a proposition was made by the representatives of the Du Puys to Mr. Whitaker, special counsel for the Government and in charge of the Government's case at the time, subject to the solicitor and the commissioner, that the amount fixed by the Government should be paid with the right reserved to bring suit to recover the same back. At another conference the same proposition, in substance, was made to the commissioner. In both instances Mr. Whitaker and the commissioner told the representatives of the Du Puys, in substance, that this amount would be accepted by the Government only in full settlement. At the last conference it was understood that an offer of this amount would be made by plaintiff in compromise and settlement of the taxes and penalties claimed by the Government from him and his wife, which would be accepted on behalf of the Government.

XV. Pursuant to the understanding reached at the last conference, the plaintiff, on November 9, 1920, wrote the following letter:

NOVEMBER 9, 1920.

C. G. LLEWELLYN, ESQ.,
Collector of Internal Revenue,
Pittsburgh, Pa.

DEAR SIR: Referring to letters, dated February 11th, 1920, addressed to Herbert Du Puy and Amy H. Du Puy, respec-

tively, and signed by G. V. Newton, Acting Assistant to Commissioner of Internal Revenue, and to the claims for abatement of the additional taxes and penalties assessed against Herbert Du Puy and Amy H. Du Puy for the years 1916, 1917, and 1918, filed February 25th, 1920, which are still pending before the Bureau of Internal Revenue, and to the claims which are now being made by the United States for additional taxes and penalties for the year 1919, which have not yet been assessed, but for which demand is about to be made, and inasmuch as there have arisen differences of opinion and disputes with respect to the legality of the additional taxes and penalties assessed for the years 1916, 1917, and 1918, and the additional taxes and penalties claimed to be due for the year 1919 but not yet assessed, and with respect to the charges of fraud in the above-mentioned letters and similar charges for the year 1919, in order to compromise and settle all controversies, claims, and liabilities in the manner hereinafter set forth, I, on behalf of myself and my wife, Mrs. Amy H. Du Puy, hereby make the following offer of compromise, and tender herewith two bank cashiers' checks, one for $1,000,000 on the Farmers' Loan & Trust Company, New York, and the other for $972,016.81 on the Farmers' Deposit National Bank, Pittsburgh, or a total of $1,972,016.81, to cover the payment of

(1) The additional taxes claimed to be due for the years 1916, 1917, 1918, and 1919, amounting in all to the sum of $1,722,016.81; and

(2) The sum of $250,000, in full settlement and compromise of all further civil liability for penalties claimed in connection therewith and all right to, in any way or under any circumstances, cause to be instituted or prosecuted criminal proceedings, charges or allegations of any nature whatsoever in connection therewith and in full settlement and release thereof and of any and all liability arising in connection therewith.

(3) Upon the acceptance of these payments, as aforesaid, the said Herbert Du Puy and Amy H. Du Puy shall be relieved from any and all claims for taxes, penalties, and liabilities of any nature whatsoever under existing law arising out of or in connection with the returns for, or payments of, taxes or penalties due, or claimed to be due, from me or from my wife, Amy H. Du Puy, for the years 1916, 1917, 1918, and 1919.

Neither this offer of compromise, nor any payment made, or action taken, thereunder, shall be used as an admission by, or offered in evidence against, Herbert Du Puy, Amy H. Du Puy, Morewood Realty Holding Company, Lansing Realty

Holding Company, or Goodwin Sand & Gravel Company, or their successor or successors or representatives, or any of them, in any future action or proceeding of any nature whatsoever.

As a result of and by reason of the basis in which this settlement is proposed to be made it is understood that the commissioner will issue to the Morewood Realty Holding Company, Lansing Realty Holding Company, and the Goodwin Sand & Gravel Company, respectively, certificates of overpayment of taxes in such amounts as he may find them to be entitled to by reason of taxes paid by said companies, respectively, on the income taxed to Herbert Du Puy and Amy H. Du Puy under this settlement.

Respectfully submitted.

(Signed) HERBERT DU PUY.

Encls.

To this letter the Commissioner of Internal Revenue replied as of date November 12, 1920, advising the plaintiff that his offer was accepted on the conditions set out in his letter.

The letter of the commissioner bore the following indorsement:

"(Signed) WM. M. WILLIAMS,
"*Commissioner.*

"November 15, 1920.

"Approved by direction of the Secretary (JOUETT SHOUSE).

"(Signed) JOUETT SHOUSE,
"*Assistant Secretary.*"

The said letter of the commissioner is attached to the petition as Exhibit D and is made a part hereof by reference thereto.

Carl D. Mapes, Acting Solicitor, rendered an opinion recommending that the total tax assessed against Herbert and Amy H. Du Puy be reduced to $1,722,016.81, and that the penalty be reduced to $250,000 in compromise of both civil and criminal penalties and liabilities, the total tax and penalty under this recommendation being $1,972,016.81. This opinion was dated September 30, 1920.

XVI. At a conference held on October 1, 1920, the commissioner stated in substance that since additional taxes for

1917, 1918, and 1919, in an amount determined against the plaintiff as before stated, represented in part income which had already been returned by the New York Corporations, who had paid taxes upon income on which some of these additional assessments were levied against the plaintiff, certificates of overassessment would be promptly issued to the said corporations for the amount of assessment upon income which, under the settlement, had been assessed against plaintiff. No certificates of overassessment to the said corporations were issued prior to the filing of plaintiff's claim for refund herein on May 7, 1923. After the filing of the plaintiff's claim for refund herein such certificates of overassessment were issued to the said corporations and refunds were made to them of the taxes which they had paid upon the same income that had been charged to the plaintiff as the basis for the said additional taxes. The said corporations, at the time of receiving such credits or refunds, wrote to the commissioner to the effect that they did not regard themselves as entitled to these refunds, and that in event the plaintiff succeeded in this action the said corporations would make repayment to the defendant of the amount of the said refunds made to the corporations; but said corporations accepted said refund checks and cashed them. The sums refunded were pursuant to claims for refunds previously filed by the corporations on March 2, 1921, and not withdrawn.

The letter of plaintiff dated November 9, 1920, addressed to C. G. Llewellyn, Collector, and hereinabove set forth, was accompanied by two bank cashiers' checks for a total of $1,972,016.81; and, at the same time of the delivery of the letter, plaintiff stated to the collector that he intended to ask for a refund and to "push the matter to the end."

XVII. Plaintiff, under the revenue act of September 8, 1916 (39 Stat. 756), the revenue act of September 8, 1916, as amended by the revenue act of October 3, 1917 (40 Stat. 300), and the revenue act of February 24, 1919 (40 Stat. 1057), filed his income-tax returns for the calendar years 1916, 1917, 1918, and 1919, which returns showed net taxable income and a total tax due as follows, and paid in the

amounts and on the dates indicated opposite the amount of the tax returned.

Year	Net taxable income	Total tax due	Date	Amount paid
1916	$902, 347. 88	$79, 545. 27	5/24/17	$79, 545. 27
1917	303, 308. 34	85, 828. 25	6/15/18	85, 825. 25
1918	447, 599. 16	282, 584. 19	3/31/19	72, 500. 00
			6/19/19	68, 792. 09
			9/15/19	70, 646. 05
			12/13/19	70, 646. 05
1919	310, 894. 34	174, 226. 60	3/24/20	36, 500. 00
			4/19/20	6, 595. 77
			4/28/20	463. 65
			6/16/20	40, 569. 32
			9/14/20	42, 062. 99
			12/16/20	48, 034. 87

Plaintiff paid additional income tax for the calendar year 1917 in the sum of $14,659.82 on June 29, 1919.

The payment above listed on December 16, 1920, of $48,-034.87, was the last quarterly payment on the original return for 1919. The tax shown due on this original return was not in controversy and was assessed on the April, 1920, list long prior to November 9, 1920. The payment of the last quarterly payment thereon was not in derogation of the terms of the letter of November 9, 1920, or of the acceptance letter of November 12, 1920.

XVIII. As the result of the investigation made by the Bureau of Internal Revenue beginning November 24, 1919, such investigation and subsequent proceedings being more fully hereinbefore described, there was assessed against plaintiff on the 11th day of February, 1920, additional taxes for the years 1916, 1917, and 1918. A portion of the additional assessments was paid and abatement claims filed covering the balance of these assessments, which abatement claims were allowed in part, and that portion of the abatement claims disallowed was paid as additional taxes, being payment made with the letter of November 9, 1920, hereinbefore more particularly referred to.

The allowance of the abatement claims was in conformity with the amount accepted on November 12, 1920, by the Bureau of Internal Revenue, in lieu of additional taxes and penalties for 1916, 1917, and 1918. The assessments were pursuant to the terms of such payment on November 9, 1920.

In the original investigation by the Bureau of Internal Revenue beginning November 24, 1919, the plaintiff's taxes for 1919 were not involved and did not become involved in the Government's computation during the year 1920. As a further result of the investigation aforesaid there was assessed against plaintiff on the 13th day of December, 1920, additional taxes for the year 1919, this tax being assessed approximately one month after it was paid on November 12, 1920. There is set out below the additional tax assessed for each of the years named, additional tax paid February 25, 1920, the portion of the additional tax abated and date of abatement, and additional tax paid November 12, 1920.

Year	Add'l tax assessed	Add'l tax paid	Add'l tax abated	Add'l tax paid
	Feb. 11, 1920	*Feb. 25, 1920*	*Jan. 7, 1921*	*Nov. 12, 1920*
1916	$20, 179. 95	$4, 288. 27	$12, 609. 81	$3, 281. 87
1917	1, 058, 240. 82	20, 871. 98	796, 590. 38	240, 778. 46
1918	454, 192. 74	4, 295. 97	278, 023. 11	171, 873. 66
	Dec. 13, 1920			*Jan., 1921*
1919	954, 626. 14			954, 626. 14

The amount assessed on December 13, 1920, for the years 1917, 1918, and 1919, were in conformity with the amount accepted in lieu of additional taxes and penalties on November 9, 1920, and were pursuant to the terms of such payment on that date.

XIX. The following stipulation has been agreed upon and signed by the attorneys of the respective parties:

(i) Pursuant to filing his income-tax return for the calendar year 1916 plaintiff paid to the collector of internal revenue at Pittsburgh, Pennsylvania, as income taxes for the calendar year 1916 under the provisions of the revenue act of 1916, the following sums on the dates indicated:

May 24, 1917	$79, 545. 27
February 27, 1920	4, 288. 27
November 12, 1920	3, 281. 87
Total	87, 115. 41

(ii) For the calendar year 1916, exclusive of the items in dispute listed below, the following is a correct statement of the net income and tax of plaintiff:

Net income		$896, 772. 22
Less:		
Dividends	$184, 983. 88	
Personal exemption	4, 000. 00	
		188, 983. 88
Income subject to normal tax at 2%		707, 788. 34
Normal tax:		
At 2%		14, 155. 77
Less: 1% collected at source		7, 680. 35
Balance of normal tax		6, 475. 42
Surtax:		
On $500,000.00		33, 000. 00
On $396,772.22		39, 677. 22
Total tax on above income		79, 152. 64

STATEMENT OF ITEM OF INCOME AT ISSUE HEREIN, YEAR 1916

1. During the year 1916 plaintiff received dividends from the Connellsville Central Coke Company in the total amount of $142,050.00. The commissioner treated all of these dividends as taxable income to the plaintiff at the 1916 rates. Of these dividends $62,422.45 have been included under dividends in the foregoing computation, leaving $79,627.55 in issue.

On the foregoing item of income in dispute, taxes were assessed against the plaintiff for 1916 and paid by plaintiff.

(iii) Pursuant to filing his income-tax return for the calendar year 1917 plaintiff paid as his income taxes for the calendar year 1917 under the provisions of the revenue act of 1916, as amended by the revenue act of 1917, the following sums on the dates indicated:

June 15, 1918	$85, 825. 25
June 29, 1919	14, 659. 82
February 27, 1920	20, 871. 98
November 12, 1920	240, 778. 46
Total	362, 135. 51

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(iv) For the calendar year 1917, exclusive of the items in dispute listed below, the following is a correct statement of plaintiff's net income subject to normal tax, tax paid at the source on tax-free bonds, and income subject to surtax:

Net income subject to normal tax at 1916 rates		$440, 114. 97
Net income subject to normal tax at 1917 rates		442, 114. 97
Tax paid at source		118. 20
Income subject to surtax—		
At 1916 rates	$49, 605. 86	
At 1917 rates	509, 903. 47	
		559, 509. 33
Excess-profits tax		43, 530. 18

The plaintiff is entitled to personal exemption of $4,000 for computation of the normal tax at the 1916 rates, and personal exemption of $2,000 for computation of normal tax at the 1917 rates.

STATEMENT OF ITEMS OF INCOME AT ISSUE HEREIN FOR YEAR 1917

1. During the year 1917 plaintiff asserts the Morewood Realty Holding Company received rentals from the Moline Plow Company, which rentals had previously been given by plaintiff to the Morewood Realty Holding Company in the sum of $25,447.10. The commissioner treated these rentals as taxable income of plaintiff for the year 1917.

2. During the year 1917 plaintiff asserts there was received by the following corporations dividends in the amounts listed from corporate stocks which had been previously transferred to such corporations by plaintiff:

Morewood Realty Holding Company, $132,212.50.

Lansing Realty Holding Company, $53,000.00.

Goodwin Sand & Gravel Company, $2,835.00.

These dividends were treated by the commissioner as income of plaintiff for the year 1917.

3. During the year 1917 plaintiff asserts that there was paid to the following corporations interest in the sum of $14,100 by plaintiff on notes of plaintiff held by said corporations:

Morewood Realty Holding Company.

Lansing Realty Holding Company.

Goodwin Sand & Gravel Company.

This amount of interest was disallowed by the commissioner as a deduction in computing plaintiff's net taxable income for 1917.

4. During the year 1917 plaintiff asserts there was received by the following corporations interest in the sum of $4,612.91 from securities which had been previously transferred to such corporations by plaintiff:

Morewood Realty Holding Company.

Lansing Realty Holding Company.

Goodwin Sand & Gravel Company.

This interest was treated as income of plaintiff for the year 1917.

On all of the foregoing items of income in dispute taxes were assessed against the plaintiff for 1917 and paid by plaintiff.

(v) Pursuant to filing his income-tax return for the calendar year 1918 plaintiff paid the collector of internal revenue at Pittsburgh, Pennsylvania, as his income taxes for the calendar year 1918, under the provisions of the revenue act of 1918, the following sums on the dates indicated:

March 31, 1919	$72, 500. 00
June 19, 1919	68, 792. 09
September 15, 1919	70, 646. 05
December 13, 1919	70, 646. 05
February 27, 1920	4, 295. 97
November 12, 1920	171, 873. 66
Total	458, 753. 82

(vi) For the calendar year 1918, exclusive of the items in dispute listed below, the following is a correct statement of plaintiff's net income subject to normal tax and income subject to surtax:

Net income subject to normal tax	$427, 155. 48
Income subject to surtax	437, 259. 76

The plaintiff is entitled to personal exemption of $2,000 for the year 1918.

STATEMENT OF ITEMS OF INCOME AT ISSUE HEREIN, YEAR 1918

1. During the year 1918 plaintiff asserts the Morewood Realty Holding Company received rentals from the Moline

Plow Company, which rentals had previously been given by plaintiff to the Morewood Realty Holding Company in the sum of $74,156.48. The commissioner treated these rentals as taxable income of plaintiff for the year 1918.

2. During the year 1918 plaintiff asserts there was paid to the Morewood Realty Holding Company interest in the sum of $20,196 by plaintiff on notes of plaintiff held by said corporation. This amount was disallowed by the commissioner as a deduction in computing plaintiff's net taxable income for 1918.

3. During the year 1918 plaintiff asserts there was received by the Morewood Realty Holding Company interest in the sum of $18,142.73 from securities which had been previously transferred to such corporation by plaintiff. This interest was treated by the commissioner as income of plaintiff for the year 1918.

4. During the year 1918 there was received by the following corporations dividends in the amounts listed from corporate stocks which plaintiff alleges had been previously transferred to such corporations by plaintiff.

Morewood Realty Holding Company, $141,724.

Goodwin Sand & Gravel Company, $12,780.

These dividends were treated by the commissioner as income of plaintiff for the year 1918.

On the foregoing items of income in dispute. taxes were assessed against the plaintiff for 1918 and paid by plaintiff.

(vii) Pursuant to the filing of his return for the calendar year 1919 plaintiff paid to the collector of internal revenue at Pittsburgh, Pennsylvania, as his income taxes for the calendar year 1919, under the provisions of the revenue act of 1918, the following sums on the dates indicated:

March 24, 1920	$36, 500. 00
April 17, 1920	6, 595. 77
April 28, 1920	463. 65
June 16, 1920	40, 569. 32
September 14, 1920	42, 062. 99
November 12, 1920	954, 626. 14
December 16, 1920	48, 034. 87
Total	1, 128, 852. 74

Reporter's Statement of the Case

(viii) For the calendar year 1919, exclusive of the items in dispute listed below, the following is a correct statement of plaintiff's net income subject to normal tax, and income subject to surtax:

Net income subject to normal tax	$329, 259. 82
Income subject to surtax	339, 672. 72

The plaintiff is entitled to personal exemption of $2,000 for the year 1919.

STATEMENT OF ITEMS OF INCOME AT ISSUE HEREIN, YEAR 1919

1. During the year 1919 plaintiff asserts the Morewood Realty Holding Company and the Goodwin Sand & Gravel Company, New York corporations, sold securities at a net profit of $898,918.24, which securities had been previously transferred to such corporations by plaintiff. The commissioner included such net profit in the taxable income of plaintiff for the year 1919.

2. During the year 1919 the plaintiff alleges the Morewood Realty Holding Company sold 722 shares of stock of the Farmers' Deposit National Bank of Pittsburgh, Pennsylvania, at a net profit of $16,216.12. The profit on sale of these securities was additional to the profit on the sale of the securities enumerated in (1) above. This profit of $16,216.12 was included by the commissioner in the plaintiff's taxable income for the year 1919.

3. During the year 1919 plaintiff asserts he sold Chicago Elevated Railway Company bonds for the sum of $500, which bonds cost plaintiff, subsequent to March 1, 1913, the sum of $24,062.50. These bonds were purchased at said sale at the Vesey Street Auction House by the Morewood Realty Holding Company. The commissioner disallowed the difference between the alleged cost and sales price of these bonds—$23,562.50—as a deductible loss in computing plaintiff's net income for the year 1919.

4. Plaintiff in his return for the year 1919 deducted a loss of $63,418.12 as loss on the sale of securities during the year 1919. The commissioner in arriving at plaintiff's taxable net income for 1919 disallowed this amount as a loss and added a like amount to income.

5. During the year 1919 plaintiff asserts there was received by the following corporations dividends and interest in the amounts listed from corporate stocks which plaintiff had previously transferred to such corporations:

Morewood Realty Holding Company, Goodwin Sand & Gravel Company—

Interest, $34,767.80.

Dividends, $198,411.

These dividends and interest were treated by the commissioner as income of plaintiff for the year 1919.

6. During the year 1919 plaintiff asserts the Morewood Realty Holding Company received rentals from the Moline Plow Company, which rentals had previously been given by plaintiff to the Morewood Realty Holding Company in the sum of $48,195.30. The commissioner treated these rentals as taxable income of plaintiff for the year 1919.

7. During the year 1919 there was paid to the following corporations interest in the sum of $37,398 by plaintiff on notes of plaintiff held by said corporations.

Morewood Realty Holding Company.

Goodwin Sand & Gravel Company.

This amount of interest was disallowed by the commissioner as a deduction in computing plaintiff's net taxable income for 1919.

On all of the foregoing items of income in dispute, taxes were assessed against the plaintiff for 1919 and paid by plaintiff.

XX. The total tax paid by plaintiff for each year 1916, 1917, 1918, and 1919 is the tax on the income conceded by the taxpayer in the stipulation as correct, plus the excepted items above referred to.

Refund claims for each of the years 1916, 1917, 1918, and 1919 were duly filed with the collector of internal revenue at Pittsburgh, Pa., on the 7th day of May, 1923, setting forth the alleged wrongful inclusion of the aforesaid excepted items of income and the claimed wrongful disallowance of the aforesaid excepted deductions, which claims were by the Commissioner of Internal Revenue rejected un-

der date of May 15, 1924. This suit was instituted March 24, 1925.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This action is a suit to recover income taxes alleged to have been wrongfully assessed against the plaintiff for the years 1916, 1917, 1918, and 1919, as a deficiency. The plaintiff paid the amount of the deficiency assessment, filed a claim for refund, and asks judgment for the amount paid. The defendant pleads full settlement and compromise of the taxes involved, and also that the taxes were due and rightfully collected from the plaintiff.

The assessments involved grew out of transactions which the plaintiff had with certain corporations and for the most part pertained to income from property which the plaintiff had transferred to them without consideration. As far back as 1908, plaintiff and his wife, both of whom possessed great wealth, contemplated providing their four children with independent means and incomes by means of transfers of property to them directly, or to corporations for their use and benefit. In pursuance of this purpose, large amounts of property were transferred without consideration directly to their children, or to corporations created or controlled by the plaintiff. In the years 1917, 1918, and 1919 property which had a market value of nearly $12,000,000 was transferred to three corporations controlled by the plaintiff, the stock of which, however, eventually was held by the children. The total amount transferred to these corporations from 1908 to 1920 approximated $25,000,000 in value.

The particular assessments that are in controversy are set out in Finding XIX, and they apply to the taxes of 1916, 1917, 1918, and 1919. An examination of the statements with reference to the taxes in controversy contained in this finding will show that they were made chiefly upon income derived from property which the plaintiff had transferred to these corporations, consisting of dividends, interest, and rentals; also profits on the sale of stocks and securities held by these corporations and obtained from the plaintiff or

claimed to be his property, the theory of the Government officials being that the transfers made by plaintiff were not in good faith and were invalid for that reason, or, at least, that the property had been transferred to corporations which were controlled by him and used after the enactment of the Federal income tax for the purpose of evading its provisions. There was also a claim on behalf of the Government that interest which was paid to these corporations by the plaintiff on money alleged to have been borrowed from them was not in fact paid, and therefore the deduction which plaintiff had taken in his income tax by reason thereof was disallowed; and the commissioner also disallowed a deduction made by plaintiff in his return for 1919 on account of a loss alleged to have been sustained on a sale by him of bonds for a small sum at public auction to one of these corporations controlled, as before stated, by himself. In short, the Government contended that all of these transactions set out in Finding XIX as being in dispute were part of a fraudulent scheme of the plaintiff to defeat the Government in the collection of income taxes justly due from him for the years named. In support of their respective contentions as to the facts, the plaintiff and defendant introduced at great length both oral and documentary evidence, the latter largely in the form of account-book entries. It would require too much space to even summarize this evidence. The plaintiff paid all of the taxes, specified in Finding XIX as being in dispute, together with a penalty thereon at the time of entering into a contract with the defendant, which the defendant alleges was in full settlement of all of the additional taxes and penalties assessed against plaintiff and his wife. Subsequently, and within the time prescribed by the statute of limitations, he filed a claim for refund of the whole amount of additional taxes and penalty paid for his own account. He now vigorously insists that he acted in good faith in all of the transactions involved, and that none of these additional taxes or penalties were due and owing from him at the time they were paid. Having within the period of limitations filed a claim for refund, he now asks judgment for the whole amount paid for taxes and penalties assessed

against him at the time of the alleged settlement, which he insists is not binding upon him. The respective contentions of the plaintiff and the defendant with respect to the separate items of assessments present numerous questions of law and fact which in many instances are inextricably mingled.

The plaintiff had a right to give his property to his children or to a corporation for their benefit, either as stockholders or otherwise, and thereafter the income from the property transferred could not be rightfully assessed against him. It was only necessary that the transfers should be in good faith and that the corporations should not be used as a device for enabling the plaintiff to escape income taxes, while he in fact kept control and had the use of the property. It would have been perfectly easy for the plaintiff to have so conducted these transactions and to have had the accounts so kept on his own books and the books of the corporations as to demonstrate that the transfers were made in good faith and without any purpose to play fast and loose with the Government if such was the fact. Either through misfortune or design in many instances this was not done, and his oral testimony is so general in its nature that it affords little assistance in explanation of the transactions which are attacked by the Government. On the other hand, it must be said that there are some of them which need no explanation as they afford no basis for any claim of fraud or illegality.

We do not, however, find it necessary to review the voluminous testimony offered and analyze the indefinite and involved entries that appear on the account books with reference to these transactions in order to determine whether, as counsel for defendant contend, the plaintiff was not acting in good faith with reference to certain of these transfers and other transactions in connection with the corporations, and whether they, or some of them, were in fact made or entered into for the purpose of defrauding the Government, and had in law that effect. In any event, as stated in the letters hereinafter mentioned, a controversy arose between plaintiff and the defendant as to the validity of the assessments and taxes involved herein and a contract was entered into between the parties, the terms of which control the decision in the case, as will be shown hereinafter.

Opinion of the Court

The plaintiff and defendant entered into an agreement for full settlement and compromise of the taxes involved in the case by and through an offer contained in a letter dated November 9, 1920, addressed to the collector of internal revenue at Pittsburgh, Pennsylvania, by the plaintiff, a copy of which is set out in Finding XV, and an acceptance thereof contained in a reply to this letter dated November 12, 1920, signed by the Commissioner of Internal Revenue. The plaintiff, however, contends that by reason of a provision included in his letter and offer, no evidence thereof can be received or considered by the court. It must be conceded that if the next to the last paragraph of the letter of plaintiff is applied literally the plaintiff's objection to any evidence of a settlement or a payment thereunder, or anything done in relation thereto, must be sustained, and the situation is as if the contract and agreement had never been executed. The terms of this paragraph are broad and sweeping, and are as follows:

"Neither this offer of compromise, nor any payment made or action taken thereunder, shall be used as an admission by, or offered in evidence against, Herbert Du Puy, Amy H. Du Puy, Morewood Realty Holding Company, Lansing Realty Holding Company, or Goodwin Sand & Gravel Company, or their successor or successors, or representatives, or any of them, in any future action or proceeding of any nature whatsoever."

We think it needs no argument to prove that a so-called settlement of which no evidence can be given, either in writing or orally on behalf of one of the parties thereto, is in fact no settlement at all, and if this paragraph must control the decision of the court, defendant's plea of settlement at once comes to an end. But as this provision completely nullifies the former provisions in plaintiff's letter containing the offer to pay $1,972,016.81, which was made "in order to compromise and settle all controversies, claims, and liabilities," and "in full settlement and compromise" of all civil and criminal liability in connection with taxes for the years 1916, 1917, 1918, and 1919, it becomes necessary to consider whether such a provision in a contract of settlement is enforceable.

In this connection it should be kept in mind that the parties had been for some months endeavoring to effect a settlement of the taxes in question, and frequent conferences between them had been held; and that finally a basis of agreement had been found and the parties came to a mutual understanding that the taxes and penalties assessed against plaintiff and his wife, Amy H. Du Puy, could be settled for the amount stated above. In fact, if oral evidence is admissible with relation to the payment and the terms thereof, the oral evidence of the settlement is abundant; but as the provision under consideration excludes any evidence of payment, the oral evidence, if this provision be followed, is incompetent, and on account of the requirements of the statute with reference to settlements it may be that it could not be used in any event.

The question involved has often been considered by the courts with, so far as we have been able to ascertain, perfect unanimity of opinion with reference to the construction of contracts in which a clause or proviso is found wholly nullifying the main provisions thereof and rendering them of no force and effect.

Davis v. *Frazier*, 150 N. C. 447, is a leading case. The opinion therein quotes with approval from Bishop on Contracts, section 386, as follows:

"After interpretation has exhausted itself in harmonizing the several clauses and words, if there is a residue which can not be reconciled, the repugnancy must be got rid of by rejecting what will free the contract from it."

Also from the same author, section 387:

"If the main body of the writing is followed by a proviso wholly repugnant thereto, it must necessarily be rejected, because otherwise the entire contract will be rendered null; but where it can be construed to qualify the main provisions so that all may stand together, it will be permitted to be retained."

Also quoting from *Jones* v. *Casualty Co.*, 140 N. C. 262:

"It is an undoubted principle that a subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent of the contract will be set aside."

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The oral evidence leaves no doubt that the general purpose and intent of the contract was to make a settlement. On two different occasions, once by Mr. Whitaker, special counsel for the Government, and at another time by the commissioner, the representatives of the plaintiff were informed that only a final settlement would be agreed to on behalf of the Government. It may be claimed that the oral evidence is incompetent. If so, we need only consider the contract itself, which provides for "full settlement and compromise," using the strongest and most explicit terms. If the contention of the plaintiff is to be sustained, nothing was settled. The two provisions of the contract are so utterly repugnant that both can not stand. The first expresses the general purpose of the contract, as is shown by both the oral evidence and the contract itself.

Moreover, if there was not to be a settlement there was no possible object in the contract. It accomplished nothing, was unenforceable, and without consideration. It bound neither plaintiff nor defendant, and became merely a scrap of paper.

Bean v. *Aetna Life Insurance Co.*, 111 Tenn. 186, is another leading case on the construction of conflicting clauses in a contract. In the decision in this case it is said:

"When two clauses of a contract are in conflict, the first governs rather than the last."

And quoting from Blackstone:

"If there be two clauses so totally repugnant that they can not stand together, the first will be received and the last rejected."

Also from *Wisconsin Marine, etc., Bank* v. *Wilkin*, 95 Wis. 111:

"The law is so settled on the subject that it can not be contended but that if the last clause of the contract is so repugnant to the first that both can not stand, the first must be taken as expressing the contract between the parties."

To the same effect is 2 Parsons on Contracts, 513, and *Straus* v. *Wanamaker*, 175 Pa. 213.

Where a construction can be given the latter clause which will be consistent with the other terms of the contract and its

main purposes, the courts hold that such a construction should be given it, but this rule does not apply where the latter clause is utterly repugnant to the main purposes of the contract and would nullify it. The rule as above stated in such cases is simply that the latter clause will be rejected and the contract will stand.

It is suggested that a construction might be given the paragraph under consideration which would not be in conflict with the agreement for a settlement and compromise. This suggestion is made on the ground that such was the intention of the parties. On this point it is sufficient to say that if such a construction could properly be given this paragraph of the agreement, it would be as fatal to the plaintiff's cause of action herein as if this paragraph of plaintiff's letter were disregarded entirely.

The plaintiff also contends that the agreement for a compromise and settlement is void, for the reason that no consideration was received for it. We do not think this contention merits extended discussion. Plaintiff is correct in saying that the evidence shows that when the final figure for compromise and settlement was reached, the representatives of the Government had come to the conclusion that no larger amount of taxes than the amount fixed for this item and included in the total to be paid could be legally collected, and it is therefore said that the Government yielded or gave up nothing as a consideration for the agreement. It is not necessary for us to decide whether a consideration would be found in the fact that the Government officials, as the conferences progressed, had been yielding one point after another. Any consideration, however small, will support a contract for compromise and settlement. Plaintiff's agreement to compromise and settle was not simply based on the amount of taxes which the Government officials agreed to accept. There were two other very important and moving considerations. The Government agreed to accept in compromise of the penalties a sum which not only was more than a million dollars less than the amount of penalties originally assessed, but was many thousands less than the statutory amount of penalties on the taxes as finally computed. Besides this it was agreed, on behalf of the Govern-

ment, that all right to institute any criminal proceedings or charges would be relinquished, and that all liabilities of any nature whatever in connection with the taxes or penalties due or claimed to be due, either from the plaintiff or his wife, were to be extinguished. It is immaterial whether the plaintiff could in fact be legally subjected to these penalties, or whether he was subject to criminal prosecution. It is sufficient if the representatives for the Government believed that such was the case, as they undoubtedly did, and we hold that there was not only sufficient but ample consideration for the agreement.

There was also a still further consideration for the settlement. Part at least of the income which was in controversy upon which, under the settlement, the plaintiff was to pay taxes had theretofore been assessed against corporations to which the property had been transferred and taxes paid thereon by them. The contract of settlement provided that these taxes should be refunded to the corporations. (See last paragraph of plaintiff's letter of November 9, 1920.) This, of course, was proper to prevent the income being taxed both against the corporations and the plaintiff, but the Government had the money and it was nevertheless a consideration. The fact that there was some delay about this payment is immaterial. The corporations had some time before filed a claim for refund, and by the settlement the Government contracted to pay them the refund.

It is also urged on behalf of the plaintiff that in executing the contract of settlement he acted under duress. It is true that the Government officials refused to accept the sum finally agreed upon unless it was paid without protest and in compromise and full settlement of the amount claimed. But we can not believe that the attorneys on either side were so ignorant as not to know that the plaintiff, had he so desired, could have paid or at least tendered this sum without making any agreement of settlement; and that whether this amount was received by the Government or not, the result would be the same. With the exception of the criminal proceedings mentioned in the agreement and the balance of the penalty, the Government could have proceeded no further and the

plaintiff could have sued for a refund if the payment was accepted on behalf of the Government. We repeat that there could have been no object in making the contract unless it was for the purpose of a final settlement of both civil and criminal liability, and the assurance that the Government would not attempt to exact more in either case.

It seems to be contended also that the proceedings of the Government with reference to collecting the tax and in the negotiations show duress. We need not determine whether any courtesies were required in making an examination of plaintiff's books or whether at the time this was done the plaintiff was given a full opportunity to investigate the case on behalf of the Government. Certain it is that as the subsequent conferences between the two parties progressed the additional assessments against the plaintiff were discussed item by item and were fully understood by him. At these conferences what was said with reference to criminal prosecution appears to have been brought in by the plaintiff, who wanted to have the settlement cover this matter. It is well settled that the fact that one party to a settlement entered into it reluctantly will not void it, and it has even been held that the fact that plaintiff is under arrest at the time the compromise is entered into will not be sufficient to defeat it; and, as a matter of course, the fact that one of the parties signed the settlement to avoid the trouble and expense of a law suit does not amount to intimidation or duress, for that is ordinarily the purpose of a settlement. The seizure of property by legal process on a claim made in good faith will not invalidate a compromise settlement. In *United States* v. *Child & Co.*, 12 Wall. 232, 244, it is said:

"But no case can be found, we apprehend, where a party who, without force or intimidation and with a full knowledge of all the facts of the case, accepts on account of an unliquidated and controverted demand a sum less than what he claims and believes to be due him, and agrees to accept that sum in full satisfaction, has been permitted to avoid his act on the ground that this is duress."

The principle upon which this statement in based applies equally to the converse of the case where a party, with full knowledge, pays a sum greater than what he claims he should

and believes that he ought to pay, and pays it in full settlement. The facts in the *Child's case* much nearer approach duress than in the case at bar. Like the instant case, a very large sum was involved, but unlike the instant case, it was stated in the opinion of the Court of Claims, from which an appeal had been taken, that the action of the Government had "reduced them (Child & Company) to the verge of bankruptcy," and it appeared that the plaintiff did not sign the receipt voluntarily, but under protest. In the case at bar the plaintiff, during the negotiations for settlement, was represented by able attorneys, and both they and the plaintiff knew before the settlement was signed everything that they know now. In order to successfully defend on the ground of force or duress, it must be shown that the party benefited thereby constrained or forced the action of the injured party, and even threatened financial disaster is not sufficient. *McCormick* v. *St. Louis*, 166 Mo. 315, 334. That plaintiff, who was at the time under indictment in connection with the tax return of the Crucible Steel Co., made the settlement to avoid some threatened or possible embarrassment or inconvenience is quite plain, but in the case last cited this is said to be usually the moving influence in bringing about a settlement. There is nothing in the evidence to show any threats or intimidation on the part of the Government officials.

If the counsel for the Government had acted in bad faith, the conclusion would be different, but there is nothing in the evidence to show bad faith on their part.

The defendant also urges that the payment of $1,972,016.81 accompanying the letter of offer was made without protest, and at the time when it was paid a protest was necessary to recover any of it back. It is true that Du Puy stated to the collector in substance that he proposed to "push the matter to the end," but this statement was not contained in his letter which went on to Washington for determination of whether his offer should be accepted. Moreover, it was expressly stated at the conferences at which the settlement was made that this amount would not be received as paid under protest. In fact, that was one of the conditions which the Government officials insisted upon if a settlement was to be made. The plaintiff could have simply paid what the Government offi-

cials demanded and made a protest if he had desired, without the settlement. He did not see fit to do this, and, consequently, must be held to have paid without protest. It was not until about three years after the payment that a suit could be maintained to recover a tax without protest. This was provided by the revenue act of 1924, section 1014, 43 Stat. 343. The payment was a voluntary one, as we have before found, and we think that plaintiff's suit is also precluded by reason of a lack of protest. *United States* v. *N. Y. & Cuba Mail S. S. Co.*, 200 U. S. 488; *Fox* v. *Edwards*, 280 Fed. 413.

The conclusions which we have reached with reference to the contract for settlement and the lack of protest make it unnecessary to determine whether the taxes paid by the plaintiff were legally due and owing to the Government. It follows that his petition must be dismissed, and it is so ordered.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

FRANK D. SCHROTH, RECEIVER OF CAPE MAY REAL ESTATE CO., v. THE UNITED STATES

[No. C–669. Decided April 1, 1929]

On Plaintiff's Motion to Modify Judgment

Eminent domain; just compensation; payment to receiver; distribution by Court of Chancery, State of New Jersey, to holders of encumbrances; interest on delayed judgment.—(1) Where the receiver of a company by suit recovers compensation from the United States for a taking of the company's land in the State of New Jersey, the judgment of the court may be so framed as to order payment to the receiver and distribution by him, under the direction of the Court of Chancery of said State, in which the receivership is pending, to the holders of enumerated encumbrances according to the priority that may be ascertained and determined by that court.

(2) Where the Government took the land with full knowledge of the encumbrances, and payment of the judgment was delayed owing to the refusal of the holder of one of the encumbrances

to furnish a release which the court, upon motion of the Government, required before transcript of judgment certifying same for payment might issue, the Government can not complain of the allowance of interest, as part of just compensation, to the date of the delayed payment.

The Reporter's statement of the case:

Mr. Thomas F. Gain for the motion to modify. *Messrs. Ira Jewell Williams* and *Francis Shunk Brown* were on the brief.

Mr. Assistant Attorney General Herman J. Galloway, opposed.

Mr. Kenneth N. Parkinson for motion for leave to file intervening petition.

The original decision in this case is reported at 65 C. Cls. 49. The judgment was modified June 18, 1928, as appears in the opinion which follows:

MOSS, *Judge*, delivered the opinion of the court:

On February 20, 1928, this court entered judgment in favor of plaintiff, Frank D. Schroth, receiver of the Cape May Real Estate Company, in the sum of $567,621.50, together with interest on the principal sum of $365,500 at the rate of 6 per cent per annum from the date of judgment until paid.

At the time of the taking by the Government of the property involved herein, and at the time of the rendition and entry of said judgment, said property was encumbered with liens of record in a total sum greatly in excess of the amount of the judgment.

On June 18, 1928, and before the issuance of the transcript of judgment, the court, on the motion of the Government, modified said judgment by the addition of the following provision:

"The transcript of judgment shall not be certified for payment until plaintiff shall have filed in this court releases of the encumbrances set forth in Finding XXVII."

Thereafter, to wit, on November 28, 1928, plaintiff filed his motion to reform and modify the judgment by striking

therefrom the requirement for the filing of releases as provided in the foregoing modification and substituting therefor a provision that the amount recovered by plaintiff under said judgment be distributed by him under direction of the Court of Chancery of New Jersey in accordance with the respective priorities of the several encumbrances enumerated in said Finding XXVII, as they may be ascertained and determined by that court.

In the statement filed in support of this motion it was recited that the holders of all said encumbrances, save one, were willing to execute the necessary releases. The party refusing to do so was the assignee and owner of a judgment in favor of one Peter Shields, and against the Cape May Real Estate Company. It was made to appear that this judgment is the last in order of priority of the liens then and now existing against said property, and that the entire amount of the judgment will be insufficient to pay the prior liens. The assignee of the Shields judgment filed a motion for leave to intervene, and tendered a petition in which it was represented that the prior liens involved herein are now the subject of controversy and litigation in the New Jersey courts, and asking that certification of the judgment in this case be withheld until the final determination by said courts as to the validity and priorities of said encumbrances. To the petition presented on this motion plaintiff tendered an answer, declaring the incorrectness of the material averments of said petition, and suggesting that all questions of the validity and priority of said liens are proper matters for determination by the courts of New Jersey. This court is in perfect agreement with this view of the case on that point. It has no jurisdiction to determine the question of either the validity or the priority of these liens. The motion of the assignee of the Peter Shields judgment to intervene will be overruled.

It is now apparent that plaintiff can not comply with the modified judgment providing that the transcript of judgment shall not be certified until plaintiff shall have filed in this court releases of these encumbrances, and this situation is occasioned by the action of one only of the several lien holders, and that one holding a claim which, on the face

of the record, will probably not participate in the distribution of the proceeds of the judgment. The plaintiff, in his efforts to comply with the judgment as modified, has procured the consent of holders of liens prior to the Shields judgment aggregating in amount something more than $2,000,000. They are willing to execute the necessary releases and permit the judgment to be paid into the hands of the plaintiff, the receiver of the New Jersey court, there to be distributed under the direction of the judge of that court. Under the terms of the judgment as modified its collection will be indefinitely postponed, and the Government will have to stand the burden of accumulating charges of interest, and all because this one lien holder is apparently unwilling to have the proceeds of the judgment paid into the New Jersey court under the express stipulation that same should be distributed under the direction of that court in accordance with the respective rights of the various lien holders as they might be ascertained and determined by said court. In this situation it is the duty of this court to remove the condition, if it may legally be done, which is now operating to prevent the payment of this judgment; and we are confident that this can be done.

In the 1911–1914 Cum. Supp. to the New Jersey Compiled Statutes, p. 1185, title 66–sec. 18b (Eminent Domain), it is provided:

"In case the party entitled to receive the amount of said judgment shall refuse, upon tender thereof, to receive the same, or shall be out of the State, or under any legal disability, or *in case several parties being interested in the fund shall not agree as to the distribution thereof, or in case the lands or other property taken are encumbered by any mortgage, judgment, or other lien*, or in case for any other reason the petitioner can not safely pay the amount awarded to any person, in all such cases, on petition to the chancellor, to which shall be annexed a copy of the rule for judgment, the amount of said judgment shall be paid into the court of chancery, by order of the chancellor, and shall there be distributed according to law, on the application of any person interested therein, and written notice given to the owner or owners and to persons interested, that such moneys have been paid into court, shall have the same effect as if the moneys

mentioned in said judgment, with costs, had been actually tendered or paid to the owner or persons entitled thereto; and where notice can not be personally served, notice by advertisement in such manner as the chancellor shall direct shall have the same effect." (Our italics.)

In the case of *Crane* v. *City of Elizabeth*, 36 New Jersey Eq. 339 (1882), which involved a controversy over the proceeds of land taken in condemnation proceedings, the court said:

"But if, in any special case, this owner ought not, in equity, to receive the fund, the court of chancery will, at the instance of any interested complainant, take charge of its proper distribution, and so secure those particular equities which the generality of the statute has left without express protection."

The decision in this case was cited with approval by the United States Supreme Court in *United States* v. *Dunnington*, 146 U. S. 338 (1892), the opinion in which contains the following significant announcement:

"We think the United States discharged its entire duty to the owners of this property by the payment of the amount awarded by the commissioners into court, and that, if there were any error in the distribution of the same, it is not chargeable to the Government."

While the New Jersey statute upon which these cases depend could not be held to apply directly to a question of the taking of land by the United States Government, or of proceedings for just compensation under such taking, we are clearly of the opinion that, in the absence of a Federal statute affecting the problem with which the court is confronted, the court may, under strictly analogous reasoning, safely adopt the rule provided by said statute and announced in the foregoing decisions. The judgment will therefore be modified by striking therefrom the language: "The transcript of judgment shall not be certified for payment until plaintiff shall have filed in this court releases of the encumbrances set forth in Finding XXVII," and substituting therefor the following provision: "The amount recovered by plaintiff under this judgment shall be paid to plaintiff as receiver, and distributed by him under direction of the Court

Opinion of the Court

of Chancery of New Jersey, in which said receivership is pending, in accordance with the respective priorities of the several encumbrances enumerated in Finding XXVII as they may be ascertained and determined by that court."

The Government has filed an answer to plaintiff's motion to reform and modify the judgment opposing said motion, and asking the court to enter appropriate orders to relieve the Government of the payment of all interest from and after the date of judgment, citing as authority in support of its contention the case of *Luckenbach* v. *United States*, 272 U. S. 533.

In the motion to modify the judgment in the particulars hereinabove discussed the Government also moved the court to strike from the judgment the provision for the allowance of interest from the date thereof to the date of payment. This motion was overruled by order entered June 18, 1928, accompanied by the following memorandum:

"The Government took the property involved herein with full notice of certain encumbrances against same in the form of mortgages and judgment liens. See Finding XXVII. The courts have held that the allowance of interest from the time of the taking until payment is a fair and convenient method of determining the amount to which the owner of the land is entitled as just compensation. *United States* v. *Rogers*, 255 U. S. 163; *Seaboard Air Line Railway* v. *United States*, 261 U. S. 299. Interest is not allowable in this class of cases as compensation for the use or detention of money. It is explicitly allowed as a proper element of just compensation, and considered in that sense it is just as much a part of just compensation as any other factor which enters into its determination. The disallowance of interest on the amount determined as the value of the property at the time of the taking would be a partial denial of just compensation."

This memorandum expresses the view of the court on that subject, and it is not deemed necessary to further extend the discussion in relation thereto, except to suggest that inasmuch as the delay in the payment of the judgment in this case was, in a controlling measure, occasioned by the original motion of the Government to modify the judgment, the importance of the principle expressed in said memorandum is emphasized. The decision in the *Luckenbach case* does not

support defendant's contention on this question. The property seized in that case consisted of certain vessels. The compensation was fixed by the President, and it was then developed that although the claimant was in possession, and was operating said vessels, he was the real owner of only two of them. Claimant then procured bills of sale from the owners of the other vessels, and executed a bill of sale to the Government for all. Claimant declined to accept the award, but elected to accept three-fourths thereof and to sue for what he regarded as just compensation. The judgment was for a sum equal to the remaining one-fourth of the original award. Inasmuch as claimant recovered no more than the award, which he could have collected at the time of the award, it was very properly held that he was not entitled to interest. The difference between that case and the case under consideration seems too obvious for discussion. The motion of defendant will be overruled.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

CHAPMAN S. CLARK v. THE UNITED STATES

[No. C-1153. Decided April 1, 1929]

On the Proofs

Eminent domain; just compensation; leasehold; notice to quit; forced sale of personal property.—Where an owner of personal property produced or used by him in farming operations on land of which his wife is the lessee and which he is duly notified to quit pursuant to an Executive proclamation under the act of October 6, 1917, authorizing the Secretary of War to take the land, is forced thereby to sell the personal property at a loss, the loss is incidental to such taking and not recoverable.

The Reporter's statement of the case:

Mr. Horace S. Whitman for the plaintiff. *Mr. Stevenson A. Williams* was on the briefs.

Mr. William W. Scott, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Spesutia is the name of an island in the west side of Chesapeake Bay, Harford County, Maryland, just south of the mouth of the Susquehanna River. Spesutia Island contains approximately 1,900 acres of land. Title to all of it was formerly in one owner, but many years previous to October, 1917, it was divided into three separate farms, namely, the Lower Island Farm, the Middle Island Farm, and the Upper Island Farm. The Lower Island Farm contains 970 acres, more or less, and is at the southern end of the island and 35 acres on the mainland side of Spesutia Narrows. For many years previous to the time of his death the Lower Island Farm was owned by one Robert H. Smith, who departed this life testate on the 11th day of September, 1915. By the terms of his last will and testament the said Robert H. Smith devised and bequeathed said farm to Julian S. Smith, Chapman S. Clark, and Frederick Von Kapff, subject to the use thereof for four years from the date of his death, by his daughter, Nannie M. Clark, in trust to divide, apportion, and assign, pay over, and convey to the beneficiaries named in his will. The said Frederick Von Kapff retired as trustee previous to the time of the filing of this action, leaving as the sole trustees under the will Julian S. Smith and Chapman S. Clark.

The Middle Island Farm contained approximately 350 acres in the center of Spesutia Island, and was in October, 1917, owned by Annie C. Vandiver, Dorothy C. Vandiver, and Robert M. Vandiver.

The Upper Island Farm containing approximately 500 acres, at the northern end of Spesutia Island, was in October, 1917, owned by a corporation, the stock of which was owned and controlled by clubmen and sportsmen residing in New York City and elsewhere, and was used by them as a game preserve and hunting ground. Each of the farms extended across the island from the Chesapeake Bay on the one side to a channel of water about nine hundred feet in width, known as Spesutia Narrows. The lower and middle farms on Spesutia Island had for more than one hundred years been cultivated and were very fertile and highly productive.

Aberdeen was the nearest town and railroad point to the island, and from 1816 to 1917 access to the island had been by public road to a private road, over the 35 acres on the mainland belonging to the owners of the Lower Island Farm, thence to the mainland side of Spesutia Narrows to a landing on the said lands belonging to the owners of the Lower Island Farm, thence by ferry across the narrows, and thence by a private road running from one end of the island to the other, through the three farms. Since 1816 the owners of the Lower Island Farm had been the owners of the fee simple title of thirty-five acres of land more or less on the mainland opposite the northwestern corner of Spesutia Island, consisting of thirty acres of land on Woodpecker Point, and a road one mile long leading therefrom to the public county road. In the year 1816 one Robert Smith, who was the then owner of the Lower Island Farm on Spesutia Island, acquired the thirty-five acre tract on the mainland opposite the northwestern corner of Spesutia Island and the road leading therefrom to the public road, by deed, at which time the said Robert Smith made the following declaration in writing, and recorded the same, with the deed, in the land records of Harford County:

"Mem. All the lands and tenements contained in this deed are held by me for the use and benefit of Benedict W. Hall, Edward G. Williams, and Samuel Smith, their respective heirs and assigns, as proprietors of the several parts of Spesutia Island so that the several proprietors of said island may at all times have the free use of the same. As witness my hand this thirteenth day of August in the year eighteen hundred and sixteen.

"R. SMITH."

For more than one hundred years previous to October, 1917, the owners of the lands on Spesutia Island, jointly with the county commissioners of Harford County, Maryland, maintained for their use a ferry, which was operated from the Upper Island Farm to the mainland, and maintained a residence on the said 35 acres on the mainland suitable for a home for the ferryman and containing rooms for the accommodation of the inhabitants of the island and their friends. They also kept and maintained on the mainland stables sufficient

to accommodate the horses owned by the inhabitants of the island, and in later years maintained a garage building for automobiles and other vehicles. From 1816 to October, 1917, the thirty-five acres on the mainland and the roadways above mentioned, together with the ferry operated across Spesutia Narrows, were used by the inhabitants of the island, including plaintiff in this case, and was the principal means of ingress and egress to and from their lands to Spesutia Island for vehicular traffic and the principal means for all purposes. Occasional access was had to the island by boat from Havre de Grace, a distance of six miles. The ferryboat maintained by plaintiff and the other owners of the land on Spesutia Island was of sufficient capacity to enable plaintiff and the other inhabitants to remove all of their crops and livestock from the island farms to the place of market. In the summer time, when the weather was good, thrashing machinery and other heavy machinery were taken to the island on the ferryboat. In the wintertime, when the narrows were frozen over and when the water was very rough, the inhabitants of the island could and did occupy rooms in the ferryhouse maintained on the mainland until such times as they could cross on the ferry. At such times they could and did leave their horses and automobiles in the buildings maintained by them on the mainland for such purposes.

II. Pursuant to the terms of the will of Robert H. Smith, deceased, the trustees, Julian S. Smith and Chapman S. Clark, leased to Nannie M. Clark for the term of four years from the 11th day of September, 1915, the Lower Island Farm on Spesutia Island, excepting therefrom the fish and game privileges attached thereto. In October, 1917, Nannie M. Clark was in possession of the said farm, under said lease to her, for the unexpired term of two years.

III. On October 6, 1917, the Sixty-fifth Congress of the United States passed an urgent deficiency appropriation act (40 Stat., chap. 79, pages 345, 352, etc.) providing for the purchase of a proving ground and the payment of damages and losses resulting from the taking over of land for the proving ground. The act further provided:

"That if the land and appurtenances and improvements attached thereto, as contemplated under the foregoing ap-

propriation, can not be procured by purchase, then the President is hereby authorized and empowered to take over for the United States the immediate possession and title, including all easements, rights of way, riparian and other rights appurtenant thereto, or any land selected by him to be used for the carrying out of the purpose named in the aforesaid appropriation. That if said land and appurtenances and improvements shall be taken over as aforesaid, the United States shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President, is unsatisfactory to the persons entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum, as, added to the said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. Upon the taking over of said property by the President as aforesaid the title to all such property so taken over shall immediately vest in the United States: *Provided further*, That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to the expenditures authorized hereunder."

On the 16th day of October, 1917, pursuant to the said act of Congress, the President of the United States issued a proclamation (40 Stat. part 2, page 1707), declaring certain lands in Harford County, Maryland, to be necessary for the establishment of a proving ground, which said lands included all the lands above referred to on the mainland and on Spesutia Island. The proclamation further provided:

"I do further order as to any land and appurtenances and improvements attached thereto, lying within the limits described above, which can not be procured by purchase on or before October 20, 1917, that immediately thereafter possession and title, including all easements, rights of way, riparian and other rights appurtenant thereto, may be taken on behalf of the United States by the Secretary of War, or his duly accredited representative or representatives for use for the purposes specified in the said act of Congress, subject to the provision of the said act as to compensation to be paid therefor."

IV. In the month of October, 1917, some officers of the United States Army visited Spesutia Island and called at the home of plaintiff on said island, stating that they were there to advise him, among others, that the Government of the United States had taken over Spesutia Island, and directed him to vacate therefrom and deliver possession thereof to the United States on or before the 1st day of December, 1917. Plaintiff immediately verified the statements made by said officers by consulting with the commanding officer of the proving ground and immediately thereafter accepted the said orders to vacate.

V. Thereafter on the 14th day of December, 1917, the President of the United States issued a second proclamation (40 Stat., part 2, page 1731) whereby the President of the United States took over for the United States all that tract of land therein described for the purpose of establishing a proving ground, thereafter known as the Aberdeen Proving Ground in Harford County, Maryland. This proclamation contained the following language:

"This proclamation supersedes the proclamation issued on the 16th day of October, 1917, authorizing the Secretary of War to take over the lands above described, together with other lands, which prior proclamation, in so far as it is inconsistent with this proclamation, is hereby revoked."

All persons residing on the lands taken over were notified in the proclamation to vacate the same by January 1, 1918, and all owners of the land and improvements taken over were notified to appear before a commission and present their claims for compensation.

The lands taken over by the President by the last-said proclamation did not include the Lower Island Farm on Spesutia Island, or any part of Spesutia Island, but did include the mainland terminal of the ferry and all of the land including the road described as aforesaid on the mainland, which was the main means of ingress and egress other than by water from the town of Havre de Grace to and from the island.

VI. Immediately subsequent to the date of the second proclamation of the President of the United States, the Govern-

ment took over approximately 30,000 acres of land, covered by said proclamation, and began the establishment of a proving ground thereon. The limits of the proving ground reserve included the thirty-five acres of land on which were located the private road, the ferryhouse and other buildings heretofore mentioned, and a part of Spesutia Narrows. Immediately following the establishing of the proving ground on the land that was taken over by the Government, the buildings used by plaintiff and other inhabitants of the island, on the mainland, were torn down and destroyed. Plaintiff and the other inhabitants were and have been since said time refused the right to maintain the ferry on the Government's lands, as theretofore maintained, and the Government also refused plaintiff and the other inhabitants of the island, together with their employees and guests, the right to use without restriction that part of the private road within the limits of the proving ground except at the will and by the permission of those in authority at the proving ground. Since the day and date that the Government took over the lands and established the proving ground thereon all persons desiring to go to Spesutia Island are stopped at the limits of the proving ground by sentries and if the noncommissioned officer in charge of the gate deems it proper the person is given a pass directing him to appear at the administration building within twenty minutes, where he is required to explain the purpose of his visit, and if such explanation is satisfactory to the officer in charge, he is given a pass, not as a matter of right, but at the will of the said officer in charge, to go to the island, but must report to the administration building for another pass before being allowed to leave the proving ground, on his return from the island. All baggage, packages, bundles, merchandise, etc., are by regulations promulgated by the commandant of the proving ground, required to be taken to the administration building, opened and inspected by the military authorities before a pass will be issued allowing anyone to take baggage, packages, bundles, or merchandise through or from the proving ground.

The Government has built and constructed roadways over and across the proving ground, some of which roadways are

built of concrete and others of macadam. One of these roadways leads from near the administration building in the proving ground to the site of the ferry terminal. The Government will not permit heavy machinery of any kind to be taken over said roadways.

In the year 1918 the United States declared Spesutia Narrows and a part of Spesutia Island, including a large part of the plaintiff's lands, a danger zone from gunfire and aerial bombs from the United States proving ground, and published a map showing the said danger zone in the newspapers of Baltimore City and Harford County, Maryland, and through the same means warned the public, including the plaintiff, not to enter the said zone. When plaintiff and other persons pass through the proving ground to the island they have to pass through an area on the mainland declared to be a danger zone because of the flight of aeroplanes carrying bombs and other explosives. The United States established and operates upon the lands taken over for the Aberdeen Proving Ground, a testing station for guns and established and maintains a flying field thereon for the training of aviators and the testing of aeroplanes and aerial bombs for war purposes, which training and testing include the carrying and dropping of bombs, flares, and other dangerous devices. Since the establishment of the proving ground, defendant's officers and enlisted men, operating aeroplanes, have at intervals operated aeroplanes carrying bombs and other explosives over plaintiff's farm and have repeatedly operated aeroplanes carrying such bombs and explosives over Spesutia Narrows. One bomb was dropped near plaintiff's barn. It does not appear from the testimony in the record just how frequently aeroplanes loaded with bombs have been operated over Spesutia Island. Such aeroplanes were operated over Spesutia Narrows almost daily. From time to time the officers of the United States Army have fired shells from antiaircraft guns over and on the Lower Island Farm on Spesutia Island, several of which shells have burst on said land. One shell fired from a gun by defendant's officers burst in very close proximity to the front porch of the house occupied by plaintiff and his family.

In a few instances flares have fallen from aeroplanes flying over said farm. One flare fell in flames within a few feet from the front porch of the home of plaintiff.

Subsequent to the giving of notice to vacate, as heretofore mentioned, some enlisted men in charge of a United States Army officer, entered upon the Lower Island Farm and cut several trees in furtherance of the Government's plan to use said farm.

Due to lack of access to Spesutia Island it has been since the establishment of the proving ground an impossibility for plaintiff to operate the farm in a profitable manner.

On account of aeroplanes loaded with bombs and other explosives flying over the narrows and over the lands on Spesutia Island, and also on account of the fact that the inhabitants of the island have been denied the free right to go to and from the island, plaintiff has been unable to keep necessary laborers on the farm to operate the same.

VII. During the time that Nannie M. Clark occupied said Lower Island Farm, under her lease, her husband, Chapman S. Clark, plaintiff herein, operated said farm. It does not appear under what conditions plaintiff occupied or operated said farm under the lease of his said wife, or what rights or interest he had therein. Chapman S. Clark was the owner of all of the stock, farming tools, and farming equipment. He did general farming and raised corn, wheat, oats, tomatoes, hay, and garden vegetables of the kind that grew in that climate. In addition to general farming Chapman S. Clark was engaged in the breeding and raising of cattle and purebred hogs. Immediately following the orders to vacate the premises on or before December 1, 1917, plaintiff applied to the commandant of the proving ground for permission to keep his high-grade stock on the farm later than the 1st day of December in order that it might be disposed of to better advantage, which request was refused. Immediately following the refusal of this request plaintiff began to remove and dispose of all of his personal property, including farm machinery, tools, and equipment, and proceeded to sell his blooded stock on the market. Some of the plaintiff's farming machinery was practically new, and for his use was

worth practically as much as new machinery and equipment, but by selling it as secondhand machinery and at forced sale he did not realize more than one-half of its actual value. At that time plaintiff could not find a market for his purebred stock and was forced to and did sell his hogs and cattle at general market prices. As a result of being forced to sell and dispose of his personal property, including his purebred hogs, on or before December 1, 1917, plaintiff suffered a loss of $5,761. Plaintiff has not been paid any amount whatever for the losses he sustained and the inconvenience he suffered by reason of the notice to vacate the farm on or before December 1, 1917.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This case is a companion case of *Nannie M. Clark* v. *United States*, C–1084, this day decided in favor of the plaintiff. [*Ante*, p. 337.]

The plaintiff here is the husband of Nannie M. Clark and the owner of certain blooded stock and other property which was kept upon the leased premises. What rights or privileges, if any, the plaintiff had in the property taken does not appear, and the loss claimed, if connected with injury to the leasehold of Nannie M. Clark, was incidental. The case is controlled by *Mitchell* v. *United States*, 58 C. Cls. 443, 267 U. S. 341. There was no authority under the statute involved to take anything other than the land and appurtenances. There was no statutory right conferred to take the property involved. The plaintiff can not recover for consequential damages for loss of the character claimed as for the taking of property. There is nothing in the record to show that the Government took the property or intended to take it.

The petition should be dismissed, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

CORNELIA VANDERBILT CECIL v. THE UNITED STATES

[No. H-552. Decided April 1, 1929]

On the Proofs

Lease of premises; failure to remove railroad embankment; cost of removal; betterment.—A covenant in a lease that the "lessee shall undertake to have removed within 30 days after it vacates said premises, all railroad tracks and structures placed thereon" during the period of the lease, includes a ramp or embankment on both sides of which are switch tracks and between them freight warehouses, platforms, and a macadam roadway for the receipt, storing, and handling of goods, and where such removal has not been effected, but a partial removal would result in betterment, the lessor is entitled to recover only the cost of such partial removal.

The Reporter's statement of the case:

Mr. Walter H. Griffin for the plaintiff. *Putney, Twombley & Putney* were on the brief.

Mr. Edwin S. McCrary, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. On or about the 7th day of April, 1914, William K. Vanderbilt, and on or about the 25th day of March, 1914, Edith Stuyvesant Vanderbilt, now Edith Gerry, were duly appointed by the surrogate's court of the county and State of New York executors and trustees under the last will and testament of George W. Vanderbilt, deceased. They both thereafter duly qualified, and Edith Stuyvesant Vanderbilt, now Edith Gerry, from March 25th, 1914, up to October 22d, 1926, has been and now is acting as executrix and trustee. William K. Vanderbilt acted as trustee up to the time of his death, on or about July 22d, 1920. Prior thereto and on or about the 16th day of April, 1914, William K. Vanderbilt, as trustee, nominated as successor to himself as trustee, Frederick W. Vanderbilt, by an instrument in writing under and pursuant to the provisions of the will of the said George W. Vanderbilt, which written instrument was duly executed in

the manner and form as a deed of real property to be recorded under the laws of the State of New York and was after the death of William K. Vanderbilt duly filed in the office of the clerk of the surrogate's court of the county and State of New York, in accordance with the directions in the said will of George W. Vanderbilt. The said Frederick W. Vanderbilt upon the death, as aforesaid, of William K. Vanderbilt accepted the said appointment as such trustee and duly qualified as such and is now and ever since has been acting as such trustee. Annexed to the plaintiff's petition, marked "Schedule I," which is made a part hereof by reference, is a duly authenticated copy of the record of the surrogate's court, county and State of New York, setting forth the will of George W. Vanderbilt and showing the said appointment of the said William K. Vanderbilt and Edith Stuyvesant Vanderbilt, now Edith Gerry, as executor and executrix, respectively, and as trustees of the estate of George W. Vanderbilt, and also annexed to the plaintiff's petition is a copy of the aforesaid appointment made by William K. Vanderbilt, appointing Frederick W. Vanderbilt as his successor as trustee as aforesaid, marked "Schedule II," which is made a part hereof by reference.

II. Edith Stuyvesant Vanderbilt, now Edith Gerry, as trustee, and said William K. Vanderbilt, as trustee, held title as such trustees to the premises mentioned and described in the lease and renewal of lease hereinafter referred to, up to the time of the death of said William K. Vanderbilt and from that time up to October 22d, 1926, Edith Stuyvesant Vanderbilt, now Edith Gerry, and Frederick W. Vanderbilt, as such trustees, held title to the premises mentioned and described in the said lease.

III. On or about the 14th day of December, 1917, the estate of George W. Vanderbilt, Edith S. Vanderbilt, and Wm. K. Vanderbilt, as trustees, entered into a written lease with J. L. Knowlton, colonel, Quartermaster Corps, U. S. Army, for and in behalf of the United States of America, whereby approximately eight acres of land designated on the tax map of the Borough of Richmond, City of New York, as Ward 4, Vol. 3, Plot 15, Lot 322, were leased to the United

States for the term beginning with January 21, 1918, and ending with June 30, 1918, at a monthly rental of $83.333. Said lease was signed by Talbot Root, Esq., as the duly authorized agent and attorney of the said trustees, and the said lease was signed by the said J. L. Knowlton, duly acting for and on behalf of the United States of America under due and proper authorization, by which he was vested with authority to make such lease and more particularly in accordance with section 3732 of the Revised Statutes of the United States and under 1st indorsement, War Department, November 10th, 1917, 481–CR (Fox Hills).

A copy of said lease is attached to the petition of the plaintiff on file herein as Schedule III, and is made a part hereof by reference.

IV. The lease of December 14, 1917, contains the following pertinent provisions:

"This property is to be used by the United States Government to construct a clearing hospital thereon.

* * * * * * *

"* * * it is further understood that the lessee shall undertake to have removed within thirty (30) days after it vacates said premises, all railroad tracks and structures placed thereon during the period of this lease or any renewal thereof.

* * * * * * *

"That all buildings and other improvements fixed to or erected or placed in or upon the said premises by the lessee shall be and remain the exclusive property of the lessee, provided, however, that the same shall be removed by the lessee within 30 days after the said premises are vacated under this lease."

During the negotiations for the leasing of the property involved herein, and prior to the preparation and execution of the written lease, Mr. Talbot Root, who acted in this matter as agent of the Vanderbilts, was informed by a representative of the United States that it was the intention of the United States to run a switch railroad track onto the Vanderbilt property and to construct a trestle or other work on the property to support the railroad tracks and storehouses which would be built there. The provision of the

said lease, above quoted, referring to the removal of "all railroad tracks and structures placed thereon during the period of this lease or any renewal thereof," was inserted in the said lease for the express purpose of fixing a definite obligation upon the United States to remove the contemplated ramp or trestlework upon the termination of its tenancy.

V. On or about the 21st day of January, 1918, the United States, through its agents, entered into the possession and occupation of the premises described in the aforesaid lease and continued in occupation and possession thereof as tenants, under said lease and renewal thereof, up to and including the 26th day of May, 1922, under the same terms and conditions as expressed in said lease and during said times used said premises for the purposes set forth in said lease, and on or about the 26th of May, 1922, the United States quit and surrendered said premises to said trustees. The property described in said lease is a part of the property devised in trust under the said last will and testament of George W. Vanderbilt, deceased.

VI. The plaintiff is the only child of and is the daughter of the said George W. Vanderbilt, deceased, and is mentioned and described in the said will of the said decedent as "Cornelia Stuyvesant" and is now the wife of John Francis Amherst Cecil. The plaintiff attained the age of 25 years on the 22d day of August, 1925. The property mentioned and described in the aforesaid lease, attached to the plaintiff's petition as Schedule III, and by reference made a part hereof, is a part of the residuary estate of the said George W. Vanderbilt, deceased, described in his said will and as part of which said residuary estate was conveyed to the plaintiff by the said Edith Gerry, formerly Edith Stuyvesant Vanderbilt, as executrix and as trustee and by Frederick W. Vanderbilt, as substituted trustee under the last will and testament of George W. Vanderbilt, by a confirmatory deed delivered to the plaintiff, dated October 22d, 1926, and duly recorded in the office of the clerk of the county of Richmond in Liber 643 of Deeds, page 493, on the 17th day of June, 1927. Under the terms of the said will of the said George W. Vanderbilt, deceased, the plaintiff became

the sole owner in fee and is now the sole owner in fee of the premises mentioned and described in the said lease.

VII. The premises described in the said lease were approximately eight acres in area and triangular in shape. The westerly leg of the triangle parallels the Staten Island Railroad, which is but a comparatively few yards distant. The opposite leg for two-thirds of its length is contiguous to the property formerly owned by the Italian National Rifle Shooting Society, No. F-163, decided by the Court of Claims December 3, 1928. The property adjoining the base of the triangle on the northeast is developed to some extent with streets and houses, whereas the property to the east and the west was at all of the times involved herein, with the exception of the railroad, undeveloped either for commercial or residential uses. Prior to the occupation of the property by the United States it was comparatively level, with a slight upward slope from its base at the northeast to its apex at the southwest. It was lower than the grade of the Staten Island Railroad on the west and was several feet lower than the Hylan Boulevard, which was located several hundred yards to the east. Approximately one-third of the leased premises comprising the southwest portion or apex of the triangle was a swamp.

VIII. During the period of its occupancy the United States built an embankment or ramp 300 feet long with an average width of 175 feet and average depth of 10 feet, and containing approximately 20,000 cubic yards of earth and cinders, upon the leased premises. The embankment is a part and continuation of the one constructed on the land of the Italian National Rifle Shooting Society and enters the property of the plaintiff about midway on its southwesterly side. The embankment is approximately 22 feet high at the point where it intersects the plaintiff's property and it slopes downward toward the base at the northeast to a height of approximately three feet. The construction of the ramp or embankment was necessary in order to make possible the extension of a switch railroad track connecting with the Staten Island Railroad on grade from the adjoining land of the Italian National Shooting Society onto the leased prem-

ises involved herein, for the reason that the land of the Italian Shooting Society was of a much higher elevation than the leased premises.

Switch railroad tracks were built by the United States upon the embankment along each of its longitudinal borders. A macadam paved roadway was constructed upon the middle portion of the ramp or embankment. Freight warehouses and covered and uncovered platforms were erected between the switch railroad tracks and the roadway for the receipt, storage, and handling of goods used at the hospital. Upon the termination of its lease the United States removed or caused to be removed from the property the warehouses and railroad tracks, but did not remove the embankment or the macadam road or the roadbed upon which the tracks had been laid.

IX. The leased premises at the time of the termination of the lease of the plaintiff with the United States could have been restored to as good a condition as they were in at the commencement of the term without the entire removal of the embankment. The topography of the land hereinbefore generally described was such that between 13,000 and 14,000 cubic yards of the earth which formed the ramp could have been removed and distributed over the premises so that the entire area would have again been restored to its original general contour, but with a slightly higher elevation and with the low and swampy portions filled in; all of which would have been a betterment rather than a detriment to the property. That operation could have been performed at a cost of not more than $10,000.

To have entirely removed from the premises the approximately 20,000 cubic yards of earth and cinders which were contained in the embankment would have necessitated an expenditure of $20,000.

The court decided that plaintiff was entitled to recover $10,000.00.

SINNOTT, *Judge*, delivered the opinion of the court:

The premises of the plaintiff and adjoining land of the Italian National Rifle Shooting Society were leased to the

defendant for the construction of a clearing hospital. Other lands in the vicinity were acquired by defendant for the same purpose. The defendant constructed a branch or switch road from the Staten Island Railroad through the property of the Italian Society, and extended said switch road onto the leased property of the plaintiff. For the reason that the property of plaintiff was much below the desired railroad grade, the defendant constructed a fill or embankment, referred to in the findings as a ramp on the leased premises. This ramp was 300 feet long, with an average width of 175 feet, and an average depth of 10 feet, and contained approximately 20,000 cubic yards of earth and cinders. The fill was approximately 22 feet high at the point where it intersects plaintiff's property and slopes toward the base at the northeast to a height of approximately 3 feet. Switch railroad tracks were built by defendant on top of and along each of the longitudinal borders of the embankment. A macadam paved roadway was constructed by defendant on the middle portion of the ramp or embankment; also freight warehouses and covered and uncovered platforms were erected by defendant thereon and between the switch railroad tracks and the roadway, for the receipt, storage, and handling of goods used at the hospital.

On or about the 26th of May, 1922, the defendant quit and surrendered the leased premises and caused to be removed from the property the warehouses and railroad tracks, but did not remove the embankment or the macadam road or the roadbed upon which the tracks had been laid.

The question involved herein is whether the defendant should be held for its failure to remove the embankment, macadam road, or roadbed. The following are the pertinent provisions of the lease:

"* * * it is further understood that the lessee shall undertake to have removed within thirty (30) days after it vacates said premises, all railroad tracks and structures placed thereon during the period of this lease or any renewal thereof.

* * * * * * *

"That all buildings and other improvements fixed to or erected or placed in or upon the said premises by the lessee

shall be and remain the exclusive property of the lessee, provided, however, that the same shall be removed by the lessee within 30 days after the said premises are vacated under this lease."

The undisputed testimony on behalf of plaintiff, as set forth in Finding IV, is that it was the intention of defendant to run a switch railroad track on plaintiff's property and to construct a trestle or other work on the property to support the railroad tracks and storehouses, which would be built thereon, and that the first provision of the lease, above quoted, was inserted in said lease for the express purpose of fixing a definite obligation upon the United States to remove the contemplated ramp or trestlework, upon the termination of its tenancy.

We think there can be no doubt that the removal of the embankment or ramp was within the first provision of the lease above cited, requiring the removal of "all railroad tracks and structures placed thereon." Instead of using a trestlework to support the railroad tracks, freight warehouses, covered and uncovered platforms, and the roadway for the receipt, storage, and handling of goods used at the hospital, the embankment or ramp was employed. The embankment was employed in lieu of a trestlework. That certainly constituted it a railroad structure. Defendant admits, on page 38 of its brief, that "if a trestle had been erected, as was contemplated, over this low land in order to support the railroad track or tracks, that such trestle would have had to be removed."

Defendant further contends on the same page—

"that if a railroad embankment to support tracks had been placed upon the ground that same would have come within the requirements of the lease, but the embankment in question is more than an embankment to support railroad tracks. It is much wider than needed for that purpose. A railroad embankment is not 175 feet wide, as was this fill-in embankment, and we respectfully submit that when an embankment is made 175 feet wide and covered with macadam to make a paved roadway leading to warehouses and tracks that are built upon said embankment, which embankment supports the roadway and warehouses as well as the tracks, it becomes something more than a railway structure."

We think this position of the defendant is disingenuous. It is apparent that the entire use of the ramp or embankment was devoted to railroad purposes. On both sides of the embankment were constructed railroad switch tracks; between the tracks freight warehouses, covered and uncovered platforms, and the macadam roadway were constructed for the receipt, storage, and handling of goods used at the hospital. If the embankment was made wider than needed, as defendant contends, it was so made at the instance of defendant. We can see very little difference in the use of an embankment and a trestlework to support the railroad tracks, the warehouses, and the roadway. Both trestlework and the embankment may be classified as railroad structures. Had a trestlework been erected to support the tracks, the warehouses, and roadway, defendant could not successfully contend that the trestlework should not be removed because it was wider than needed for these purposes. The same reasoning should apply to the embankment.

The commissioner of this court, who made the report, viewed the premises and found that it would cost approximately $20,000 entirely to remove the ramp or embankment from the premises, but further found, in Finding IX, that a part of the embankment could be used for the betterment of the property at a cost of not more than $10,000. To this finding, we understand from plaintiff's brief, no exception is made by plaintiff. While the point is not made in plaintiff's brief, the case of *Chase* v. *Sioux City*, 86 Iowa 603, seems to be authority for holding that the ramp or embankment may be defined as an "improvement" so as to bring it within the second provision of the lease above cited, requiring the removal of "all buildings and other improvements." But this point we deem it unnecessary to decide, as we feel that the ramp or embankment is clearly a railroad structure, within the scope and meaning of the first provision of the lease above quoted.

Judgment should be entered in favor of the plaintiff, and it is so ordered.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

WILLIAM VOLKER v. THE UNITED STATES

[No. H-310. Decided April 1, 1929]

On the Proofs

Income and profits taxes; creation of trust estate; exchange of property for certificates of trust; deductible loss.—Where in the creation by the taxpayer of a trust estate he transferred property thereto in exchange for certificates of trust, by the terms of which he retained the right to repurchase any that he might sell, and the fair value of the certificates was less than that of the property transferred, the difference being in part due to the restrictions upon the vendee's right of sale, the deductible loss to the taxpayer, if any, is diminished by the value of the beneficial interest which he has retained, the amount whereof he must prove.

Same; identity of claims.—A claim for refund of taxes on the ground that a deductible loss has been sustained in sale of trust certificates is not the same as one made on the ground that such a loss has occurred through the exchange of property in the first instance for the certificates thereafter sold.

The Reporter's statement of the case:

Mr. Jay C. Halls for the plaintiff. *Messrs. Albert L. Hopkins* and *Richard S. Doyle*, and *Hopkins, Starr, Hopkins & Hamel* were on the briefs.

Mr. H. A. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Lisle A. Smith* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff, William Volker, is a resident of Kansas City, Missouri, and at the time of the transactions involved in this case had been for a long time engaged in the manufacture and sale of window shades and window-shade cloth. The entire business was under his ownership and control, and was conducted by him under the firm style of William Volker & Company.

II. On the 29th day of August, 1917, the plaintiff, William Volker, and his wife conveyed to William Volker,

Albert J. Hochland, and William H. Regnery, as trustees, all of the assets of the business referred to in Finding I. This written agreement appears to have been pursuant to a prior agreement not reduced to writing, and the property was transferred to the trust estate as of June 30, 1917.

III. The trust estate was created by the plaintiff pursuant to a plan conceived to enable his employees to participate in the management and profits of the business. The trust agreement provided that the trustees in their collective capacity should be known as William Volker & Co., and under that name should so far as practicable conduct the business of the company, which has accordingly been done since July 1, 1917.

IV. The Commissioner of Internal Revenue for the year 1917 and subsequent years for income-tax purposes has treated said trust estate as an association and has taxed the same as a corporation.

V. In exchange for the assets transferred to the trust estate, as related in Finding II hereof, the plaintiff received twenty-four thousand certificates of interest in the said trust, which had an aggregate value of $2,400,000.

VI. The trust agreement contained, among other provisions, the following:

"16. This trust may at any time be terminated with the unanimous consent of all the holders of certificates of interest, issued under this agreement, * * *.

* * * * * * *

"26. At least twice a year the trustees shall cause to be taken a careful inventory of the trust estate, the value thereof to be fixed in such manner as they may determine, the loss or profits, respectively, since the last inventory period to be ascertained; set apart a portion of the trust estate as a reserve fund, to cover the depreciation, both actual and prospective, in the value of the property of the estate, and in this way fix the book value of the certificates of interest issued hereunder. The book value of each share shall be par, plus the proportion of such share in the undivided profits of the trust estate, or par less the proportion of such share in the loss account of the trust estate, as the case may be, and the book value of each share is fixed as of the first day of July, 1917, at one hundred dollars ($100.00).

In thus fixing the book value of the certificates of interest issued hereunder the reserve fund shall not be computed as a portion of the value of such certificates. The aggregate value of the certificates of interest to be issued hereunder is fixed at the time of this agreement as of the first day of July, 1917, at the sum of two million four hundred thousand dollars ($2,400,000), and each and every person acquiring any certificate of interest issued hereunder, either by direct issue or assignment, shall be conclusively held to have adopted said valuation and shall not be allowed to question the same. The trustees may at any time, by agreement with the holder of any certificate of interest, in the name and for the use and benefit of the trust estate, purchase such outstanding certificate of interest, paying therefor not more than the book value of the same, plus interest at the rate of six per cent (6%) per annum, from the date the book value is fixed to the date of purchase. Any certificates of interest purchased by the trustees may thereafter be reissued by the trustees and disposed of at not less than the book value thereof, plus interest at six per cent (6%) per annum, from the date the book value is established to the day of sale.

"Each and every certificate of interest issued hereunder is primarily issued to William Volker. It is a part of the consideration for the transfer of any certificate of interest, so issued to William Volker, that if any holder of a certificate of interest issued hereunder shall, in the lifetime of William Volker, desire to dispose of such certificate he shall first offer the same to William Volker, at the book value thereof, plus six per cent (6%) interest per annum from the date the book value is established to the date the sale is concluded, and said William Volker, in his lifetime, for a period of thirty (30) days from the making of said offer shall have the option to accept the same and the right to purchase said certificate of interest at the book value thereof, with interest thereon, as hereinbefore provided.

"It is also made a condition of the assignment of any certificate of interest issued hereunder that if, in the lifetime of William Volker, the holder and owner of the certificates of interest transferred to him shall cease to be employed by William Volker & Company, or shall depart this life, then within thirty (30) days of the happening of either of said events William Volker shall have the option to acquire said certificates of interest, at the book value thereof as of the date when said value shall have been last established, together with the interest from the date of the establishment of said book value to the date of purchase, at the rate of six per cent (6%) per annum. It shall also be a condition of the

transfer of any such certificates of interest that William Volker shall retain the option to repurchase said certificates of interest at any time in his lifetime by paying therefor the book value, as last established, together with interest from the date of the establishment of the book value to the date of purchase, at six per cent (6%) per annum, together with a bonus of ten per cent (10%) of the total value of said certificate of interest as so fixed. These conditions with respect to a repurchase of the certificates of interest by William Volker, enumerated in this paragraph, shall run with said certificates of interest and be a condition binding on each and every holder thereof in the lifetime of William Volker."

VII. The cost to the plaintiff of the assets transferred to the trustees as of June 30, 1917, was $2,645,345.98.

In determining the income-tax liability of the plaintiff for the year 1917, the commissioner refused to allow any deductible loss by reason of the transfer of such assets to the trust estate.

VIII. Immediately following the formation of the trust estate those persons who had been employed by the plaintiff for not less than five years and whose services were meritorious were given an opportunity to subscribe for the purchase of certificates of interest in the newly created trust estate at their par value.

Eight of the plaintiff's employees availed themselves of that opportunity, and on August 30, 1917, a total of one thousand eight hundred forty shares was purchased and issued to those persons, and the plaintiff received payment therefor in cash at the par value of $100 per share.

On January 22, 1918, eighty additional shares were subscribed and paid for at $100.50 per share, and on July 5, 1918, four hundred twenty-eight additional shares were subscribed and paid for at $102.50 per share, which prices represented the then book values of the stock as determined under the provisions of paragraph 26 of the articles of agreement hereinbefore set forth. During each successive year up to and including January, 1928, additional shares were subscribed and paid for at prices ranging from $107 a share in 1919 to $199 per share in 1928.

In January, 1928, a total of seven thousand seven hundred forty-nine shares had been sold and were issued and outstanding in the possession of the plaintiff's employees and associates. This calculation does not include nine thousand which were transferred to Rose R. Volker, the wife of the plaintiff, on August 13, 1917, and which were subsequently repurchased from her by the plaintiff in November, 1926.

In order to secure the release of the dower interest of his wife in certain of the property described in the trust agreement which the plaintiff desired to include in the trust estate, the plaintiff on August 31, 1917, entered into an agreement with his wife whereby he agreed to pay her $1,000,000 in consideration of her relinquishment of any right, title, or interest which she might then have in any personal property then owned by him or which he might thereafter acquire. As a part of that settlement she accepted nine thousand of the certificates of interest in the trust estate in settlement of $900,-000 of the agreed settlement of $1,000,000.

IX. On or about January 3, 1923, the plaintiff filed with the collector of internal revenue a claim for refund of taxes paid during 1918 and 1919 as the result of income received during 1917 and 1918. Of the amount sought to be recovered under the said claim for refund, $42,529.83 was for the year 1917.

A copy of the claim for refund, together with a statement of facts, brief, and statement made thereof, by reference was made part of the record in this case. It appears therefrom that the plaintiff claimed to have sustained a loss as a result of the sale to his wife and certain employees of a portion of the certificates which he received in August, 1917, and made no mention of any loss resulting from the transfer of the property which he had originally owned to the trustees of the trust estate.

X. On April 16, 1926, the Commissioner of Internal Revenue addressed a letter to the plaintiff, the first paragraph of which letter is as follows:

"Your claim for abatement of a deficiency in tax amounting to $95,134.59, assessed against you for the taxable year ended 6/30/17, has been carefully considered by this office, and it is proposed to allow the said claim for $37,310.18 and

to reject it for $57,824.41, as computed upon the enclosed statement."

In allowing the said claim in abatement the commissioner allowed the plaintiff a loss of $18,809.86 on the sale of one thousand eight hundred and forty certificates of interest during the year 1917, and any further claim for loss on account of the sale of certificates was rejected.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is a suit to recover an alleged overpayment of income and profits taxes for the calendar year 1917. The plaintiff claims that by reason of the failure of the Commissioner of Internal Revenue to allow a deduction from his income of a loss in the sum of $245,345.98 he was required to pay $87,-082.95 more taxes than were justly due.

For many years prior to July 1, 1917, plaintiff had owned and was conducting a manufacturing business under the firm name and style of William Volker & Company. With the purpose of enabling his employees to participate in the management and profits of the business, on August 29, 1917, he executed a trust agreement transferring all of the assets of this business to himself and two other persons as trustees effective as of July 1, 1917. Pursuant to the trust agreement the trustees issued to the plaintiff 24,000 shares of certificates of interest, which represented the entire beneficial interest in all of the property conveyed to the trustees, and plaintiff had the power to revoke the trust as long as he held all of the certificates. The total par value of such shares was fixed at $2,400,000.

The evidence shows that the property transferred cost $2,645,345.98 and that the fair value of the certificates of interest was the same as the par value, to wit, $2,400,000.

All the certificates of interest were issued and received by plaintiff, and thereafter he sold a large portion thereof to various parties at different prices. The claim made by plaintiff in his petition is that in the exchange of the assets of his company for the certificates of interest he lost the difference

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between the value of the certificates and the original cost of the property, and that this loss should have been deducted in determining his net income subject to tax for the year 1917.

We do not think the evidence shows that the plaintiff in fact sustained any loss for several reasons.

After the transfer and before he sold any of the certificates he had the right to revoke the trust and put himself in the same condition as he was before, in which event there would have been no loss. It may be contended that the provision of division 16 of the trust agreement, which provides that the trust might be revoked with the unanimous consent of the holders of all of the certificates, was not intended to apply to this situation, and that this condition lasted only a day. But if we consider the situation after plaintiff made a sale of some of the stock and could not revoke the trust, we still think the evidence fails to show any loss. True, the testimony on behalf of the plaintiff shows that the value of the certificates was the same as their par value, which was less than cost, but this manifestly was partly because of the peculiar conditions that were imposed upon them. Indeed, one of plaintiff's witnesses so testifies. As shown in Finding VI, the certificates could not be sold by the party to whom the plaintiff might transfer them until the holder thereof first offered them to the plaintiff at the book value plus six per cent interest, and plaintiff had thirty days in which to exercise an option to accept the same. Also, plaintiff had the absolute right to purchase these certificates at any time in his lifetime by paying the book value with interest from the date of the establishment of the book value to date of purchase, with a bonus of ten per cent of the total value. In other words, the plaintiff had not completely parted with the title when he sold any of these certificates. The purchaser could not treat them as his own and dispose of them as he saw fit. Plaintiff still retained a beneficial interest in them after he had sold them, the value of which interest is not shown by the evidence, although it is quite plain that the market value of the certificates in the hands of another party was reduced thereby. We think it doubtful whether a deductible loss can be set up within the meaning of the statute when the

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complete title is not passed, but in any event as the plaintiff still retained an interest in the property the loss, if any, on the transaction can not be measured in the same way as if he had completely parted with the title to the certificates. In other words, his loss is not so great as it would be if he had completely parted with the title. The evidence offered would apply if he had retained no rights in the stock. As the situation was, we think the evidence fails to show the amount of loss, if any.

We also think that the grounds for the refund set out in the petition are not the same as those set out in the original claim for a refund. The petition alleges that the exchange of the property for the certificates created a deductible loss. The original application for refund claims a deductible loss sustained in connection with the sale of the certificates. It is true that the preceding transactions are set out in the application, and this makes the question somewhat doubtful, but on the whole we think the application for refund was not sufficient.

It follows that the petition must be dismissed, and it is so ordered.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

SOUTHERN PACIFIC CO. v. THE UNITED STATES [1]

[No. B-367. Decided April 1, 1929]

On the Proofs

Statute of limitations; freight service.—Section 156 of the Judicial Code, prescribing the time within which suit may be brought against the United States, begins to run in the case of freight service rendered upon Government bills of lading from the time of rendition of service, and the running thereof is not postponed by reason of the provisions in the said bill of lading prescribing the routine for settlement. Cf. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *United States*, 64 C. Cls. 534.

[1] Certiorari denied.

The Reporter's statement of the case:

Mr. William R. Harr for the plaintiff. *Mr. Charles H. Bates* was on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation duly organized under the laws of the State of Kentucky, engaged as a common carrier in the transportation of passengers and freight in and through various States of the United States. Part of the lines operated by plaintiff were constructed with the aid of grants of land by the United States.

II. At and prior to the times when the services hereinafter mentioned were performed the railroad companies of the United States generally, including plaintiff, had severally agreed with the Quartermaster General of the United States Army (subject to certain exceptions not necessary here to be stated) to accept, for the transportation of property moved by the Quartermaster's Department, United States Army, and for which the United States Government was lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement.

III. During the years 1915 and 1916 the War Department of the United States made certain shipments of horses, wagons, tents, and other Army impedimenta between various points in the United States, the plaintiff being in each instance the last carrier. Said shipments were made with or accompanied the movement of troops between said points.

IV. Said shipments were made upon Government bills of lading in the form prescribed by the Comptroller of the Treasury set forth in 14 Comp. Dec., pp. 969–971, both inclusive, and subject to the conditions and instructions specified in said form.

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V. The dates of said Government bills of lading are the approximate dates of said shipments of Army impedimenta, and all of said shipments were delivered more than six years prior to the filing of plaintiff's original petition.

VI. Upon receipt from the agents of the Government of the bills of lading covering the aforesaid shipments, duly accomplished by the receiving officers of the Government, plaintiff presented the same, together with its bills or vouchers covering the freight charges, to the depot quartermaster of the United States Army at San Francisco, Calif., who forwarded the same to the Auditor for the War Department at Washington, D. C., for direct settlement, in one instance (plaintiff's bill 39963) a certificate in lieu of the bill of lading being obtained and forwarded.

During the period covered by the petition in this case, it was customary for the plaintiff, so far as possible, to render its bills or vouchers monthly for Government transportation, but before doing so it was necessary for plaintiff to obtain from the receiving officers of the Government the bills of lading, duly accomplished by them, or a certificate of service in lieu thereof. It was also the practice for plaintiff, before submitting its bills or vouchers, to check the bills of lading or certificates of service with the depot quartermaster at San Francisco for errors or omissions in accomplishment in respect to the weights and description of the property billed, and also to send the depot quartermaster at San Francisco a memorandum for preliminary check as to rates and charges. When plaintiff finally presented its bills or vouchers to the depot quartermaster at San Francisco, the latter would pay said bills or such of them as he was authorized by law and the rulings of the auditors of the Treasury Department or the Comptroller of the Treasury to pay, those not so authorized being forwarded by the depot quartermaster, together with the accomplished bills of lading or certificates of service, to the proper auditor of the Treasury Department at Washington, D. C., for settlement.

VII. Plaintiff as last carrier presented its bills or vouchers for the aforesaid transportation based upon certain rates published by it applicable exclusively to the shipment of Army impedimenta upon Government bills of lading when moved

with or accompanying troops by special train or in expedited train service, and calling for one and one-half times class A net cash rates, Western Classification, minimum 30,000 pounds per car.

VIII. The rates claimed and charges made by plaintiff for said transportation were disallowed by the accounting officers from plaintiff's original bills in direct settlements of the numbers and dates specified in plaintiff's Exhibit A to the original petition (which is made a part of this finding by reference), said accounting officers holding that the Government was entitled to a certain less rate, to wit, class B, Western Classification, applicable to emigrant movables, with land-grant deductions, the aforesaid disallowances and settlements all occurring within six years of the filing of plaintiff's original petition, and, pursuant to said settlements, plaintiff was paid by defendant for said transportation on said basis, plaintiff accepting such payments under protest.

IX. The proper charges for the transportation of military impedimenta with or accompanying troops was a matter of dispute between the railroads and the accounting officers of the Government at the time of the shipments here in question, but during the period of Federal control of the railroads, to wit, in the year 1919, the U. S. Railroad Administration and the Quartermaster General of the Army agreed upon the application to such transportation of third class, Western Classification, 24,000 pounds per car, less land-grant deductions, except that livestock shipped in separate cars should take the commodity rate. After the period of Federal control ended, the carriers generally, including plaintiff, adopted and published said third-class rate, with land-grant deductions, for the transportation of military impedimenta, excepting livestock and personal baggage, and settlement for shipments of military impedimenta has since been made by the defendant on the basis stated. Recently the Secretary of War advised the Attorney General that in his opinion the rates last mentioned were just and reasonable for the transportation of military impedimenta for the Government

during the years 1915–1918, and, with respect to certain other and similar cases pending in this court, the Comptroller General of the United States has, upon the filing in escrow by the claimants with the Department of Justice of motions to dismiss such cases, settled said claims upon the basis stated. The claims involved in this case would have been submitted to the Comptroller General for settlement upon the basis stated but for the fact that the Government contends that these particular claims are barred by the statute of limitations governing the filing of claims in this court.

X. After making all due set-offs and corrections, the difference between the total amount paid plaintiff for the transportation referred to herein on the basis of the emigrant movables rates, and the total amount which would be due therefor on the basis of the third-class rate, 24,000 pounds per car, with land-grant deductions, for mixed carloads of military impedimenta, other articles taking regular commercial rates, with land-grant deductions, is $34,298.01, which sum, together with the amounts heretofore paid plaintiff for such transportation, represents a reasonable charge for the services rendered.

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

In this case the facts have been stipulated. The shipments involved herein were made, and the bills of lading issued therefor were accomplished more than six years prior to the filing of the original petition; and the sole question to be determined is whether or not plaintiff's claim is barred by the statute of limitations in such cases made and provided.

Section 156 of the Federal Code provides that—

"Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court * * * within six years after the claim first accrues."

It is well settled by the decisions of the courts in this particular class of cases that the cause of action accrues upon

the rendition of the services. *Baltimore & Ohio Railroad Co.* v. *United States*, 52 C. Cls. 468; *St. Louis, Brownsville & Mexico Railway Co.* v. *United States*, 63 C. Cls. 103. See also *Battelle* v. *United States*, 7 C. Cls. 297, and the recent case of *Atlantic Coast Line Co.*, decided in this court on January 7, 1929. [66 C. Cls. 576.]

In the *Baltimore & Ohio case*, which is cited with approval in the opinion in the *St. Louis, Brownsville & Mexico Railway case*, the rule is succinctly stated in the following language:

"When the service in question had been rendered there were two courses open to the plaintiff for the assertion of its rights to compensation. One was to apply for payment through the disbursing or accounting officers of the Government, and the other was by action in this court."

It is, however, plaintiff's contention that the bill of lading upon which the shipments in this case were made determines the accrual date of its cause of action. Said bill of lading contains the following conditions:

"It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of freight charges will in no case be demanded by carriers. Upon surrender of this bill of lading duly accomplished payment will be made to the last carrier, except where otherwise specifically stipulated."

Paragraph 8 of the "Instructions" printed on the reverse side of said bills of lading provides:

"Only one copy of a bill of lading will be issued for a single shipment. This bill, when receipted by the agent of the receiving carrier, will be returned to the consignor and by him mailed to the consignee, who will, upon receipt of the shipment, accomplish and surrender the bill to the last carrier. This bill then becomes the evidence upon which settlement for the service will be made."

Said Government form of bill of lading also provided for a certificate of delivery, to be filled out by the Government

officer to whom the shipment was consigned, in the following form:

CONSIGNEE'S CERTIFICATE OF DELIVERY

---, 190----
(Place) (Date)

I have this day received from ----------------------------------

-- the above
(Name of transportation company)
enumerated public property in apparent good order and condition, except as noted on the reverse of this bill of lading.

Weight ------------------------------ lbs. -------------------
(In words and figures)

To be billed or vouchered to ------------------------------------

----
(Name and address of officer)

(Consignee)

Plaintiff, as the final carrier of the shipments herein, submitted its bills of charges based upon a certain rate, which was determined by the Government to be an unauthorized tariff rate, and was finally paid for said transportation services at a rate which was lower than the rate claimed by plaintiff. It will be noted that plaintiff's contention is that it could not bring an action in this court until the accounting officers of the Government had determined the question of the applicable rate to be applied to the shipments. We are unable to agree with this contention. The right to demand payment accrues immediately upon the delivery of the property, and the accomplishment of the bills of lading and the effect of the terms and conditions contained in same were merely to provide a simple routine method for their accomplishment. This proceeding was in accordance with a long-established practice with respect to settling railroad accounts for Government transportation. Finding VI. The bills of lading did not attempt to fix the *time* for the payment of the service. In our opinion the rule announced in the decisions of the courts on the subject under discussion is not affected by the terms of the bill of lading. The court has long been familiar with the prevailing practice with respect to settling railroad accounts for Government transportation, and it must be

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presumed that due consideration was given to same in its various decisions to the effect that the right of action accrues upon the rendition of the service. In the *Atlantic Coast Line case* the bill of lading was specifically discussed and was considered by the court in its decision of the case.

Aside, however, from the foregoing observations on this point, plaintiff's contention appears to be in conflict with the spirit of the rule announced in a number of decisions cited by defendant on its brief. Among the number we cite: *United States* v. *Wilder*, 13 Wall. 254–257; *Finn* v. *United States*, 123 U. S. 227–233; *Battelle* v. *United States*, 7 C. Cls. 297–301; *Bowman* v. *United States*, 10 C. Cls. 408–411; *Patterson* v. *United States*, 21 C. Cls. 322. The following language appearing in the opinion in the last-named case seems particularly pertinent:

"The six years, by the plain provision of this statute, begins to run when the claim first accrues. That the fees in this case accrued at the time when the commissioner might have lawfully demanded payment will not be denied. After the fees became payable he had six years in which to make out his account, verify it by oath, present it to the district or circuit court for approval, *and prepare and file his petition in this court*. In the *case* of *Wilder* v. *United States* (13 Wall. 254), the Supreme Court held that when no time of payment was fixed in the contract the statute of limitations began to run from the time the services were rendered. * * * *If he wants the aid of this court, he must perform his part of this preparation within six years.* If the statute runs only from the date of the court's approval, practically there would be no limitation at all. The commissioner could choose his own time in which to make out and present his account, and thus make the court the medium of reviving a stale and outlawed claim." (Our italics.)

In the *Battelle case* this language is used:

"We think the claim 'first accrued,' in the language and meaning of the statute, when the right to demand the price for the property sold first vested in the petitioner.

"And any other construction would defeat the protection of the United States which the statute intends, for no time is fixed by law in which a creditor of the United States must present his claim to a department; and if the statute did not attach till such presentment was made, a creditor of the United States, by postponing that presentment, might post-

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pone the operation of the statute at his pleasure and thus extend the liability of the United States for twelve instead of 'six years,' which is the term of time the statute specifies for the continuance of such liability, and on which it makes the payment of the debt and the loss of its evidence a presumption *juris et de jure*.

"The purpose of the statute of limitations requires that it would not leave the time at which it is to attach at the *control of the creditor*." (Our italics.)

We again announce the rule to be that the cause of action in this class of cases accrues upon the rendition of the service, and that the right of action is not suspended during the investigation of the claim by the executive officers of the Government. The statute of limitations, intended as a wholesome protection of the Government, must not be permitted to depend upon any fluctuating or uncertain conditions that may arise from the delay occasioned by an investigation of disputed claims by executive officers. Plaintiff's theory, if sustained, would prove subversive of the purpose of the limitation fixed by the law. To require a claimant to file his action in this court within six years after the accrual of the cause of action should not be considered a great hardship. If it is necessary or desirable that his claim be subjected to an investigation by the accounting officers of the Government, with the view of securing a settlement of it in the department, he may follow that course, but he must also file his action within the statutory period in order to prevent the tolling of the statute.

The petition will be dismissed, and it is so adjudged and ordered.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

LE BOLT & COMPANY v. THE UNITED STATES

[No. H-414. Decided April 1, 1929]

On the Proofs

Income and profits taxes; alternative methods of making returns.—Where there are two methods of making an income-tax return, either one of which is legal and proper, and the taxpayer has

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made his return in accordance with one of these methods, the taxpayer, if the return is accepted and the taxes paid, can not subsequently change to the other method and thereby become entitled to a refund.

Same; sec. 234 (a) (3), revenue acts of 1918 and 1921; addition of import duties to cost of goods; deduction from gross income.—Section 234 (a) (3) of the revenue acts of 1918 and 1921, providing that certain taxes "shall be allowed" as deductions in computing net income of a corporation, is not mandatory, and where a benefit is claimed in an income and profits tax return of import duties by adding them to cost of goods, the taxpayer is not entitled to any refund that would result from a recomputation based on direct deductions of the import duties from gross income.

The Reporter's statement of the case:

Mr. Charles B. McInnis for the plaintiff. *Mr. Randolph E. Paul* and *Holmes, Paul & Havens* were on the briefs.

Mr. J. H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Ottamar Hamele* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff, Lebolt & Company, is a corporation; and was, during the years beginning February 1, 1919, and ending January 31, 1924, engaged in the business of importing precious stones and jewelry, and selling the same at retail. Upon all pearls and precious stones purchased by the plaintiff in foreign markets, plaintiff has paid the United States customs authorities a duty of 20 per cent of the cost thereof. During all such period it has kept its accounts upon the basis of the fiscal year ending January 31st and its inventory upon the basis of cost, and the duty so paid has been consistently charged by the plaintiff as an additional cost of merchandise in inventory.

II. The amount of import duties paid by the plaintiff during each of the fiscal years ended January 31, 1920, to January 31, 1924, inclusive, was transferred to a duty account on its books, and that part of the customs duties applicable to the goods sold during the particular year was charged to plaintiff's profit and loss account and deducted from income.

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while the remaining amount of customs duties paid during the particular taxable year was added to plaintiff's inventory at the end of the particular taxable year.

III. The amounts of customs duties included in the plaintiff's inventories at the end of the fiscal years January 31, 1920, to January 31, 1924, inclusive, were as follows:

Fiscal year ended January 31, 1920	$119,371.56
Fiscal year ended January 31, 1921	138,981.00
Fiscal year ended January 31, 1922	130,789.90
Fiscal year ended January 31, 1923	173,073.64
Fiscal year ended January 31, 1924	235,586.40

IV. The amount of customs duties included in the plaintiff's inventory at the beginning of the fiscal year ended January 31, 1920, was $56,430.99.

V. The amounts of customs duties paid by the plaintiff during each of the fiscal years ended January 31, 1920, to January 31, 1924, and included in its inventory at the end of the particular fiscal year are as follows:

Fiscal year ended January 31, 1920	$62,940.57
Fiscal year ended January 31, 1921	19,609.44
Fiscal year ended January 31, 1922	None.
Fiscal year ended January 31, 1923	42,283.74
Fiscal year ended January 31, 1924	62,512.76

VI. If this court decides that the plaintiff is entitled to deduct from net income all customs duties in the year in which such duties were paid, the plaintiff's taxable income as previously determined by the commissioner for the fiscal years ended January 31, 1920, to January 31, 1924, should be reduced by the following amounts:

Fiscal year ended January 31, 1920	$62,940.57
Fiscal year ended January 31, 1921	19,609.44
Fiscal year ended January 31, 1922	None.
Fiscal year ended January 31, 1923	42,283.74
Fiscal year ended January 31, 1924	62,512.76

VII. On or about March 6, 1925, the plaintiff filed with the collector of internal revenue, Chicago, Illinois, claims for refund of income and excess-profits taxes for each of the following fiscal years and in the following amounts:

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Fiscal year ended January 31, 1920	$39,504.07
Fiscal year ended January 31, 1921	4,012.53
Fiscal year ended January 31, 1923	5,285.48
Fiscal year ended January 31, 1924	7,814.10

VIII. The claim for refund of $39,504.07 for the fiscal year 1920, and the claim for refund of $4,012.53 for the fiscal year 1921, were rejected by the Commissioner of Internal Revenue on or about April 10, 1926. The claim for refund of $5,285.48 for the fiscal year 1923 was allowed for $55.97 and rejected for $5,229.51 and the claim for refund of $7,814.10 for the fiscal year 1924 was allowed for $57.98 and rejected for $7,756.12 on or about April 1, 1926.

IX. The plaintiff has paid to the collector of internal revenue, Chicago, Illinois, as income and excess-profits taxes for the fiscal years 1920, 1921, 1923, and 1924, amounts in excess of its claims for refund for the respective fiscal years.

X. The plaintiff has filed waivers of the statutory period of limitation for the fiscal period ending January 31, 1920. Consequently in its recomputation of tax liability the plaintiff has gone back to February 1, 1919. The plaintiff has made no deduction from inventory at the beginning of the year (February 1, 1919) ended January 31, 1920, because income tax has been paid upon the amounts of such inventory for the previous year on account of the inclusion of duty in inventory at the end of such previous year.

XI. The plaintiff has not assigned nor transferred its right to a refund of income and excess-profits taxes for any of the fiscal years ended January 31, 1920, to January 31, 1924, inclusive.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff in this case is an importer and in carrying on its business paid duties on goods imported from foreign countries during the years 1920 to 1924, inclusive. The amount of duty so paid was carried to a "duty account" on its books, and that part of the customs duties applicable to goods sold during a particular year was charged to plaintiff's profit and loss account and deducted from income, while

the remaining amount of customs duties paid during a particular taxable year was added to plaintiff's inventory at the end of that year. This method was equivalent to adding the amount paid as duties to the cost of the goods and making its returns accordingly. During the four years in question plaintiff made its tax returns on this basis and paid taxes in accordance therewith. It now seeks to make amended returns which, instead of including the duties paid in the cost of goods, would deduct the amount of the duties from the gross income in the same manner as other taxes paid. The Commissioner of Internal Revenue refused to accept the amended returns made in this manner and to allow plaintiff's claim for refund. The question involved in the case is whether the plaintiff, having originally made its returns as above stated, can now change its method for the years under consideration and thereby secure a refund of taxes.

The weight of authority is to the effect that where there are two methods of making an income-tax return, either one of which is legal and proper, and the taxpayer has made his return in accordance with one of these methods, then, if the return is accepted and taxes paid accordingly, the taxpayer can not subsequently change to the other method of making a return and thereby become entitled to a refund. But if there is only one legal and proper method of making a return and the taxpayer erroneously makes his return by some other method, then, even though the return has been accepted and the taxes paid, he may file an amended return correcting the error, and if this return shows an overpayment, he becomes entitled to a refund.

Counsel for defendant contend that there were two proper methods of making a return in the case at bar, and that the plaintiff could either add the duties paid to the cost of the goods imported and make its return accordingly, or it could deduct the amount of the duties paid from its gross income and make its return on that basis. On behalf of the plaintiff, it is insisted that there was but one correct method of making the return, and that was to include the duties paid among the deductions from gross income.

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Regulations 45 and 62 made by the Commissioner of Internal Revenue prescribe the manner of treating import duties in article 132, which is as follows:

"ART. 132. *Federal duties and excise taxes.*—Import or tariff duties paid to the proper customs officers, and business, license, privilege, excise and stamp taxes paid to internal revenue collectors, are deductible as taxes imposed by the authority of the United States, provided they are not added to and made a part of the expenses of the business or the cost of articles of merchandise with respect to which they are paid, in which case they can not be separately deducted."

It is evident that under this article either method might be used, and it would seem that the authorities on accounting lend some support to this regulation in that it appears that the method originally adopted by plaintiff is in accordance with good accounting practice. In article 23 of the above-mentioned regulations, it is said that:

"Approved standard methods of accounting will ordinarily be regarded as clearly reflecting income."

The plaintiff, however, insists that there is no authority in law for the regulation or the method which it followed in originally making its returns, and in support of this contention cites a part of section 234 (a) (3) of the revenue acts of 1918, 40 Stat. 1077, and 1921, 42 Stat. 254, to the effect that taxes paid or accrued within the taxable year "shall be allowed as deductions" in computing the net income of a corporation.

This the plaintiff says is mandatory, and gives the commissioner no discretion. Hence it is said that any return purporting to set forth the taxable net income of a corporation is not correct if, in computing the taxable income, it does not show a deduction of all taxes paid or accrued within the taxable year, with certain exceptions not necessary to specify here.

We do not think this provision is mandatory. While it says that taxes paid shall be allowed as deductions, we think this means that they shall be so allowed if claimed as deductions from gross income and a benefit therefrom is not claimed in some other way. While the words "to allow" or

"allowance" do not necessarily refer to a case in which a claim has been made, the dictionaries indicate that it is frequently so used, and we think it was used in such a sense in that portion of the statute under consideration.

Items of expense in connection with the purchase of goods are almost invariably added to the cost of goods by accountants; and when it becomes necessary to determine a cost of goods for the purpose of making an income-tax return, there would ordinarily be no question of the propriety of thus making up the account for income-tax purposes. The plaintiff made up its inventory on the basis of cost. While the question is not free from doubt, we think that it might properly do so and make its returns accordingly.

It follows that plaintiff's petition must be dismissed, and it is so ordered.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

SCHMOLLER & MUELLER PIANO CO. v. THE UNITED STATES

[No. F-327. Decided April 1, 1929]

On the Proofs

Income and profits taxes; invested capital; accrual basis; treatment of interest on cash basis; inclusion of accrued interest in invested capital.—Where a taxpayer's books of account are kept and its income and profits tax returns rendered upon the accrual basis except as to the interest on contracts, which is consistently set up on its books as earned and returned as income in the year in which actually received, it may not include in invested capital the interest accrued but not paid.

The Reporter's statement of the case:

Mr. George E. H. Goodner for the plaintiff.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, a Nebraska corporation, was engaged in the business of selling pianos, phonographs, and miscellaneous musical instruments at retail on the installment plan. When a sale was made by plaintiff the purchaser was required to execute a contract providing, among other things, for payments in installments, the time of completing payment being contingent upon the purchase price of the article. The contract provided for the payment of interest on the installments specified therein, the interest to become due and payable in installments when the full purchase-price installments had been paid.

For the calendar year 1919 the commissioner determined the taxable income to be $122,715.16 and the statutory invested capital to be $1,335,420.08. The amount of the deficiency for 1919, as determined by the commissioner, is $2,914.22. The plaintiff admits $595.54 of the deficiency to be due.

In the year 1909 plaintiff estimated that $120,000 interest had accrued on installment sales contracts, which amount it credited to surplus and set up as an asset an account, "interest, discount, and exchange," in a like amount. This account was carried in this manner and in the same amount in subsequent years.

In arriving at the statutory invested capital of the taxpayer for the year 1919 the commissioner reduced the surplus as shown by the books of the taxpayer at December 31, 1918, by the amount of $120,000 claimed in the return as part of its invested capital for that year.

During the audit of plaintiff's return for 1919 the taxpayer and the commissioner computed the actual accrued interest on purchase contracts or notes and found that on December 31, 1918, the accrued interest on them on which the purchase price installments had not been paid in full, as well as those on which the purchase price installments had been paid in full, was in the amount of $161,214.98, which amount the plaintiff is now claiming should be included in invested capital for 1919 as earned surplus. This accrued interest was not reflected upon plaintiff's books of account. In 1919 and prior years plaintiff credited interest to earnings as

collected and reported as income only interest actually collected within the year. Plaintiff, upon its books of account, consistently treated interest as earned in the year in which it was actually received.

Plaintiff's books of account were kept and its returns were rendered upon the accrual basis except as to the interest on contracts, which interest was consistently set up on its books as earned, and returned as income in the year in which it was actually received.

II. On March 15, 1920, plaintiff filed with the collector of internal revenue at Omaha, Nebraska, a tentative corporation income and excess-profits tax return for the calendar year 1919, showing an estimated tax of $11,818.57. On June 15, 1920, plaintiff filed with the said collector a completed corporation income and excess-profits tax return for the calendar year 1919, showing a tax due for said year of $11,450.23, which was paid by the plaintiff to the said collector.

III. On July 24, 1924, the Commissioner of Internal Revenue notified plaintiff of a deficiency in tax for 1919 of $2,914.22.

IV. Thereafter plaintiff appealed to the United States Board of Tax Appeals, which board approved the determination of the Commissioner of Internal Revenue that the sum of $2,914.22 was due for the year 1919.

V. Thereafter the Commissioner of Internal Revenue assessed the sum of $2,914.22 and plaintiff paid same on March 31, 1925.

VI. On October 9, 1925, plaintiff filed with the collector at Omaha, Nebraska, a refund claim, a true copy of which is attached to the petition as Exhibit B and made a part hereof by reference.

VII. On July 19, 1926, the commissioner rejected said claim in full and no part of the $11,450.23, originally paid or of the $2,914.22 paid as a deficiency has been refunded.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

The plaintiff was engaged in the business of selling pianos and other musical instruments on the installment plan. The

contract of sale provided for the time of completing payment, contingent upon the price of the article and interest on the installments, the interest to become due and payable after the purchase price had been paid in full.

Beginning with the year 1909 plaintiff credited on its books to surplus the sum of $120,000, being estimated interest that had accrued on installment-sales contracts, and set up the same amount as an asset in an account styled "Interest, discount, and exchange," which account was carried on the books in the same amount for the years following. In 1919, in returning its invested capital for taxing, the plaintiff included this sum, $120,000. The commissioner reduced plaintiff's surplus as of December 31, 1918, by this amount. In 1919 and prior years plaintiff treated as and credited to earnings such interest as was collected, and returned as income only interest which was actually collected within the year; and also treated upon its books of account, consistently, interest as earned in the year in which it was received.

The statute involved is the revenue act of 1918, 40 Stat. 1057, 1092, which is as follows:

"SEC. 326 (a). That as used in this title the term 'invested capital' for any year means (except as provided in subdivisions (b) and (c) of this section):

* * * * * * *

"(3) Paid-in or earned surplus and undivided profits, not including surplus and undivided profits, earned during the year; * * *."

The plaintiff did not keep its books as to these interest payments on the accrual basis, but in the following manner (Finding I):

"Taxpayer, upon its books of account, consistently treated interest as earned in the year in which it was actually received.

"Taxpayer's books of account were kept and its returns were rendered upon the accrual basis except as to the interest on contracts, which interest was consistently set up on its books as earned, and returned as income, in the year in which it was actually received."

The question is whether the plaintiff could include in invested capital interest on installment sales when the interest had not been paid and when the plaintiff had consistently

in previous years entered this interest on its books only when received, and then returned it as income.

While it kept in reserve $120,000, as the interest became due and was paid it was placed on its books in the actual manner received, and this amount was reported each year as income in its income-tax returns. The amount claimed was never reported as income, not having been received, and not being income could not become surplus as a part of invested capital.

These items of interest which were included as surplus were not due and had not been paid, and payment was not enforced in the year 1918. The Commissioner of Internal Revenue ruled against the plaintiff, and on appeal to the Board of Tax Appeals his ruling was sustained, with which ruling we agree. The petition should be dismissed, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

UNITED THEATRES CO. v. THE UNITED STATES

[No. F-360. Decided April 1, 1929]

On the Proofs

Acceptance of proposal for lease; termination before occupancy; breach.—Where a proposal for lease provides for termination at any time upon 30 days' notice and is accepted, and before occupancy the lessee notifies the lessor that it will not execute the lease, the lessor is entitled to 30 days' rent, but is not entitled to expenses of preparing the premises for the lessee.

The Reporter's statement of the case:

Mr. A. R. Serven for the plaintiff. *Taylor, Caskey & Moore* were on the briefs.

Mr. William W. Scott, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation duly organized and existing under the laws of the State of Ohio, having its principal

office at Cincinnati, and is engaged in the business of owning and operating theatre and office buildings in Cincinnati, and elsewhere.

II. For several weeks prior to June 4, 1921, representatives of the Bureau of War Risk Insurance, at its branch office in Cincinnati, Ohio, were endeavoring to negotiate a lease with the United Theatres Company for rental space in its theatre and office building then in process of construction and nearly completed in the heart of the business center of the city of Cincinnati.

On that date plaintiff submitted a proposal, prepared by the said bureau, to lease ten floors of said building at an annual rental of $128,060, payable monthly, which was at the rate of $2.00 per square foot per annum, and to make such alterations in the building as would be satisfactory to the bureau, the building to be ready for occupancy by the bureau on or about September 1, 1921.

III. The said proposal contained the following provisions:

"That the lease shall be effective for the term beginning with the date of occupancy and ending June 30, 1922, provided that the United States shall have the right to terminate this agreement and surrender possession of said premises at any time upon giving us thirty days' written notice, * * *.

* * * * * * *

"That we shall, in the installation of interior construction which might be required to fit the premises for use and occupancy by the Bureau of War Risk Insurance, such as partitions of plaster, wood or plain or florentine glass, doors, railings, heating, lighting, plumbing, fixtures, and compressed-air pipes, arrange such construction and special fixtures in such a manner as to meet the requirements of the Bureau of War Risk Insurance, provided that the material so used shall not exceed in quantity or quality that provided for similar use in the architect's original working drawings and shall furnish all necessary plans and specifications in connection therewith, all such plans and specifications to be approved by the Bureau of War Risk Insurance prior to the undertaking of any actual work of construction or installation.

* * * * * * *

"This proposal is void if not accepted on or before June 11, 1921, noon."

The other provisions of said proposal are not material to the issue here.

IV. On June 11, 1921, plaintiff received a telegram from the director of the bureau, advising that the acceptance of said proposal had been recommended and promising definite action prior to Monday noon, June 13th. Said telegram is as follows:

UNITED THEATRES CO.,
Cincinnati, O.:

Bureau has recommended acceptance united theatres building proposal for sixty-four thousand thirty square feet at two dollars per square foot stop prompt department action urged and definite answer to you prior noon Monday.

C. R. FORBES, *Director.*

Plaintiff agreed to this extension of time for the acceptance of said proposal and was advised by defendant's local representative on June 13, 1921, on the authority of a telegram from the director of the bureau, that said proposal had been accepted. The telegram reads as follows:

DISTRICT SUPERVISOR, DISTRICT NO. SEVEN,
Bureau of War Risk Insurance,
608 Lincoln Inn Court Building, Cincinnati, O.:

United Theatres Company proposal June fourth to lease sixty-four thousand and thirty square feet building five two five Walnut Street at rental two dollars per square foot per annum term from about September first to June thirty, nineteen hundred twenty two, with renewal and cancellation clauses therein and usual bureau conditions accepted stop Notify lessor immediately.

C. R. FORBES, *Director.*

The recommendation of the chief of the bureau to accept plaintiff's said proposal dated June 11, 1921, was duly approved by Assistant Secretary Clifford, of the Treasury Department.

V. Plaintiff immediately stopped all work on said building as originally planned, and a large force of workmen at once began work on the necessary alterations and changes to meet

defendant's requirements, of which it had been fully informed before submitting said proposal.

As great expedition was required in order to have the building ready for the occupancy of the bureau by September 1st, every effort was made to hurry this work as rapidly as possible.

Public notice was immediately given of the rental arrangements with the Government, and all prospective tenants were personally notified that plaintiff would be unable to furnish them office accommodations in the building, on account of its rental by the Government.

VI. After many of the alterations had been completed in whole or in part, plaintiff received on June 20, 1921, from defendant's local representative a telegram, which said representative had received from the director of the bureau.

The telegram reads as follows:

DISTRICT SUPERVISOR, DIS. NO. 7,
Bureau of War Risk Insurance, Cincinnati, O.:

Owing to extreme necessity for utmost economy to keep within appropriations it has been definitely decided to-day by this bureau to effect arrangements for less office space at more reasonable rental than has been under consideration with United Theatres Company, Cincinnati, for sixty-four thousand thirty square feet floor space without light or janitor service at annual rental of hundred twenty-eight thousand sixty dollars stop it therefore becomes impracticable to recommend the execution of the proposed lease by Treasury Department stop notice is hereby given that Bureau of War Risk Insurance terminates negotiations for occupancy of space referred to.

C. R. FORBES, *Director*.

VII. Plaintiff filed statements with the bureau showing the direct expenses for the extra work involved by this transaction, in support of its claim for damages on account of the abandonment of the contract.

These direct expenses were as follows:

Ohio Building Construction Company, $1,187.29.
Gibson & Schlemmer, plumbing, $133.30.
Architect's services, $400.00.
Garfield Winkler, electrical work, $101.45.

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Stern Plastering Company, $2,589.95.

Attorney's services, $750.00.

The total of these items amounts to $5,161.99.

VIII. The act of Congress approved March 3, 1921, 41 Stat. 1267, carried an appropriation for the rental of space for branch offices for the Bureau of War Risk Insurance during the fiscal year ending June 30, 1922. The rental space here involved was for the accommodation of the branch office of the bureau in Cincinnati, Ohio.

The court decided that plaintiff was entitled to recover $10,671.66.

GRAHAM, *Judge*, delivered the opinion of the court:

The plaintiff is suing to recover damages for breach of a contract growing out of a proposal, dated June 4, 1921, to lease a portion of a building in the city of Cincinnati and the acceptance by the Bureau of War Risk Insurance, approved by the Assistant Secretary of the Treasury, dated June 13, 1921.

On June 20, 1921, the defendant withdrew its acceptance and abrogated the contract. Under the proposal the term of the lease was to begin when the defendant went into possession, which was tentatively fixed as September 1, and to expire on June 30, 1922. The proposal provided that plaintiff should install such interior construction as might be required to fit the premises for use and occupancy by the Bureau of War Risk Insurance, such as partitions, doors, railings, heating, lighting, plumbing, etc. Upon the acceptance of the proposal plaintiff proceeded to make the installation required, and had partially completed it when the acceptance was withdrawn by defendant, as stated. There was no provision in the proposal for reimbursement to plaintiff for this installation. It was a part of what it was obligated to perform under the proposal. Plaintiff was to pay a fixed amount of rent monthly.

The proposal provided that the lease could be canceled and terminated at any time by the defendant upon thirty days' notice.

The plaintiff is seeking to recover $10,671.66, one month's rent. It claims to have expended $5,131.99 in making the installation and changes in the building called for by the proposal, and for attorney's fees. It will be seen that if the plaintiff is entitled to recover rent it is not entitled to recover for the cost of the installation and changes, or the attorney's fees. Had the defendant gone into possession and terminated the lease on thirty days' notice, there could have been no recovery for these changes. They were a part of the structure and its arrangement, which were covered by the proposal, and for which rent was to be paid.

Inasmuch as the defendant, under the proposal, could not terminate the lease except on thirty days' notice, and inasmuch as the withdrawal of acceptance may be taken as a notice of termination, the plaintiff is entitled to one month's rent, which is fixed by the findings at $10,671.66. For this sum judgment should be entered for the plaintiff, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

ANDREW L. HAAS v. THE UNITED STATES

[No. H-117. Decided April 1, 1929]

On the Proofs

Jurisdiction; finding of former Secretary; reversal on new evidence.—Where the law requires of an executive officer a determination of facts upon which depends the right to pay, the presentation of new evidence will warrant him in reversing the ruling of his predecessor in office.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *Messrs. George A. King* and *Cornelius H. Bull*, and *King & King* were on the brief.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. During the time covered by this claim plaintiff was a commissioned officer in the United States Navy. He reported to the medical officer in charge of the U. S. Naval Medical Office, Shanghai, China, December 15, 1920, complaining of shortness of breath and inability to walk. Said medical officer made the following diagnosis:

"Endocarditis acute, origin in line of duty, due to exposure while on duty on U. S. S. *Monocacy*, and trip from above ship to Shanghai"; later changed by said medical officer: "Diagnosis changed to neuritis multiple, intercurrent disease—origin probably exposure to a wet, rainy, cold trip in open boats down the upper Yangtze."

He was thereupon admitted to Fearn's Sanitarium, at Shanghai, December 16, 1920. A board of medical survey, consisting of three medical officers of the Navy, on December 30, 1920, made the following diagnosis and recommendation:

"Diagnosis, endocarditis acute; origin in line of duty. Disability is not the result of his own misconduct."

"Present condition after two weeks absolute rest in bed: Heart condition somewhat improved; however, neuritis shows no signs of improvement. Present condition: Unfit for duty. Probable future duration: Indefinite. Recommendation: That he be transferred to U. S. Naval Hospital, Mare Island, Calif., via first available transportation as soon as medical officer considers he is able to travel."

January 2, 1921, the Commander, Yangtze Patrol, approved the report and recommendation of the board of medical survey. January 7, 1921, it was approved by the commander in chief of the U. S. Asiatic Fleet.

II. February 22, 1921, the medical officer at the Mare Island (California) Hospital reported as follows:

"Neuritis multiple, No. 558; origin not in line of duty. Is due to own misconduct, probably the result of his intemperate use of alcohol."

Plaintiff on learning of this report made the following protest, March 11, 1921:

"My condition was attributed by a board of medical survey in Shanghai to be due to service conditions on the upper Yangtze. My duty there was most strenuous, the climate notoriously unhealthy, my use of alcohol on the river prac-

tically nil, and I also attribute my condition to conditions as noted previously in my health record."

He was then transferred to League Island (Philadelphia) Naval Hospital, where a board of medical survey, April 5, 1921, reported in substance as follows:

"Present history of case: Diagnosis, neuritis, multiple. Origin not in the line of duty. Disability is the result of his own misconduct. Facts are as follows: The board believes, in the absence of other causes of neuritis, and the admission of the patient that his diet, prior to onset of the disease, consisted of fresh fruit, vegetables, and meat and game, that the etiologic factor in this case is alcohol.

"Present condition: Unfit for duty. Probable future duration: Indefinite. Recommendation: That he be retained in this hospital for further treatment."

This report was approved by the commandant of the Philadelphia Navy Yard.

III. This report was forwarded to the Bureau of Medicine and Surgery, Navy Department, where it was approved by the Surgeon General of the Navy.

The Surgeon General reported:

"The bureau can not find any reference to the use of alcohol by Lieutenant Commander Haas in any of the records on file previous to the entry made at the naval hospital, Mare Island, California, February 22, 1921, and even there the entry is 'probably the result of his intemperate use of alcohol.'"

Thereupon, July 22, 1921, Theodore Roosevelt, Acting Secretary of the Navy, wrote:

"* * * the department decides that the disability necessitating this officer's absence from duty was caused by his intemperate use of alcoholic liquor," etc.

IV. Thereafter the officer requested the senior member of the medical board of survey at Shanghai, who had seen and reported his disability and the cause thereof immediately upon its occurrence, to make a statement in regard to his disability and the cause thereof.

The senior member of said board in response to this request made the following statement:

"1. At the request of Lieutenant A. L. Haas, U. S. Navy, I desire to make the following statement regarding his illness which had its inception up the Yangtze River, China. Subject to orders to report to the commander Yangtze patrol,

Lieutenant Haas came under my attention and care at Shanghai, China, on or about December 6, 1920.

"2. He was on the sick list from December 6, 1920, until his departure for the United States on or about January 25, 1921, as result of the recommendation of a board of medical survey of which I was the senior member. The board diagnosed the condition as one of multiple neuritis, complicated by an acute cardiac dilatation, origin in the line of duty, due to exposure while en route to Shanghai, China. Reference should be made to medical survey.

"3. If I remember correctly, Lieutenant Haas had a history of gastro-intestinal disorder with excessive diarrhea while he was commanding officer of his ship 1,500 miles up the Yangtze. While en route to Shanghai, subject to orders, the boat in which he was traveling was upset and he became submerged in the cold waters of the river. In my opinion this sudden exposure was most likely the precipitating cause of his illness.

"4. The question of alcohol was gone into thoroughly and the board of medical survey was informed that the patient had not taken a drink of an alcoholic beverage for two months previous to the onset of his illness and his drinking previous to that was fairly abstemious, a statement which the board had every reason to believe."

This statement was submitted to the Secretary of the Navy through the Chief of the Bureau of Medicine and Surgery with a request for favorable action.

The Surgeon General, Chief of the Bureau of Medicine and Surgery, transmitted it to the Secretary of the Navy by letter of September 21, 1923, in which he, on the basis of new evidence so submitted to him, "recommended that the previous holding in this case be set aside and that the origin of the condition from which Lieutenant Haas suffered, acute endocarditis, followed by multiple neuritis, be held to have originated in the line of duty and not due to any misconduct, and that the records be corrected accordingly and that the checkage of pay of this officer from February 22, 1921, to July 27, 1921, be removed."

The Judge Advocate General of the Navy called upon the Surgeon General for further information. The Surgeon General in turn called upon the plaintiff for such information, which was furnished. The Surgeon General obtained a further statement from the former medical officer at Mare Island in explanation of his unfavorable report. A still

further statement was called for by the Surgeon General and obtained from the plaintiff officer. The Judge Advocate General called for a still further report from the Surgeon General, who finally reported February 2, 1924:

"In view of the contemporaneous medical records and the medical survey dated December 30, 1920, in this case, and also the letter (second indorsement) dated September 4, 1923, by Lieutenant Commander Ceres, Medical Corps (who first attended Lieutenant Haas), in which conclusive statements are made relative to the origin of the physical disability and considering the circumstances and factors in the history of this case, which introduce the question of 'reasonable doubt' this bureau is of the opinion that the origin of the disability should be held to be in the line of duty and not the result of his own misconduct. The bureau, therefore, adheres to the recommendation in the fifth paragraph of its letter of September 21, 1923, herewith."

The Judge Advocate General, July 25, 1924, after reviewing the facts, made the following recommendation to the Secretary of the Navy, followed by approval of the Secretary, as follows:

"The medical question presented having thus been determined in favor of line of duty, the law relative thereto requires that said disability be held to have originated in the line of duty and not due to his own misconduct.

J. L. LATIMER.

Approved 25 July, 1924.

CURTIS D. WILBUR,
Secretary of the Navy."

V. On November 13, 1926, he was retired from active service as a lieutenant commander for incapacity resulting from an incident of service.

VI. Plaintiff has received no pay for the period of absence from duty February 22, 1921, to July 27, 1921. If entitled to pay for that period, there is due him $1,812.72.

The court decided that plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff, a lieutenant commander on the retired list of the Navy, sues herein to recover his pay as such from February 22, 1921, to July 27, 1921. The case is restricted to a single issue, and while necessary to state the facts, it in no-

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wise involves a judicial determination as to whether under them the action taken by the Navy Department was justified. The parties concede the correctness of the above statement and present the case under the one contention, i. e., does jurisdiction reside in a succeeding Secretary of the Navy to reopen and allow a claim for pay which his predecessor in office has theretofore denied?

Lieutenant Commander Haas, while on duty on the U. S. S. *Monocacy*, was compelled to make a trip down the upper Yangtze River in China, and in accomplishing the same the open boats utilized exposed him to cold rains and prevailing wet weather. His physical condition immediately thereafter was such that he was recommended for transfer to the Naval Hospital, Mare Island, California, for treatment. On February 22, 1921, he was admitted to the hospital. A board of medical survey convened in China reported that his disability had its origin in line of duty due to the recounted exposure and as not attributable to his own misconduct. This report was duly approved by the commander of the Yangtze Patrol, and afterwards on January 17, 1921, approved by the commander in chief of the U. S. Asiatic Fleet. Subsequent to the plaintiff's arrival at the Mare Island Hospital the medical officer there disagreed with the preceding report and after a technical definition of plaintiff's disabilities found that they were due to his own misconduct. The plaintiff on March 11, 1921, protested against the report.

Plaintiff was then transferred to the League Island Hospital in Philadelphia, and a board of medical survey on April 12, 1921, confirmed the findings of the Mare Island report which was thereafter approved by the commandant of the Philadelphia Navy Yard. This last report was then forwarded to the Bureau of Medicine and Surgery, Navy Department, and thereafter approved by the Surgeon General, whereupon on July 22, 1921, the Acting Secretary of the Navy approved the report and the plaintiff has not received the pay claimed for herein under the following statutes (39 Stat. 580, as amended, 40 Stat. 717):

"Hereafter no officer or enlisted man in the Navy or Marine Corps in active service who shall be absent from duty on account of injury, sickness, or disease resulting from his

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own intemperate use of drugs or alcoholic liquors, or other misconduct, shall receive pay for the period of such absence, the time so absent and the cause thereof to be ascertained under such procedure and regulations as may be prescribed by the Secretary of the Navy."

The plaintiff, being dissatisfied with the rulings adverse to his right to pay, appealed in writing to the senior member of the medical survey at Shanghai, China, and from him received the statement we have incorporated in Finding IV. This statement was through the Surgeon General transmitted to the Secretary of the Navy by letter September 21, 1923, with a recommendation that, in view of this new evidence, the plaintiff's case should be reopened and the previous ruling set aside and the records corrected by a finding disclosing the plaintiff's disabilities as incurred in line of duty, in nowise due to his own misconduct. The matter then went before the Judge Advocate General of the Navy, and this official after having secured the record in its entirety, from every source, reviewed the facts and forwarded to the Secretary of the Navy the following recommendation:

"The medical question presented having thus been determined in favor of line of duty, the law relative thereto requires that said disability be held to have originated in the line of duty and not due to his own misconduct—"

which in turn was approved by the Secretary on July 25, 1924.

The plaintiff at first received his pay and allowances for the period involved, but the same were thereafter checked against him on the theory that the action of the Acting Secretary of the Navy on July 22, 1921, concluded the plaintiff's rights, and that the subsequent reversal of said action was not within the authority of the succeeding Secretary.

The cases cited by the defendant do not foreclose the action taken by the Secretary of the Navy on July 25, 1924. The precedents relied upon point out the existence of the right to reopen and review the action of a predecessor in office upon manifest error, new evidence, fraud, and mathematical miscalculations. *Rollins* v. *United States*, 23 C. Cls. 106, 123.

In 9 Comp. Dec. 108, cited by both parties to the case, it is said:

"It is a well-established rule of law that an officer who is authorized to allow or reject claims is not authorized to allow a claim which has been rejected by his predecessor except for mistakes of fact or upon the production of material evidence subsequently discovered."

The plaintiff cites a number of cases to sustain the right of review in the event of obvious mistakes or upon new evidence. We think it unnecessary to quote from or cite the same. Attorney General Bates in 10 Op. Atty. Gen. 62 used this significant language:

"I know of no statute which prohibits the head of a department from examining and allowing a claim which has been before rejected by his predecessor; even where no new evidence is adduced, and without a statutory prohibition, I presume that he would have the power to do so. I do not think that the decision of the head of a department upon a claim before him has, upon the rights of claimants, the final and irrevocable effect of the judgment of a court of justice. Before giving them such effect, it would be necessary to introduce the care and precision in commencing and conducting proceedings, strictness in the admission of evidence, fullness of argument, and facility of appeal to the tribunal of last resort, with which, in courts of justice, the law surrounds suitors. In the administration of the executive departments, as a general rule these forms are neither appropriate nor possible, since the duties are ministerial, rather than judicial."

Aside from the fact that the action required of the executive officer in this case was a determination of facts, which it is true would result in the disallowance of the officer's pay, it is not in the strict sense of the term the submission and determination of a claim against the United States. What the different officials of the Navy did was a duty imposed by law. It was one the officials could not escape and one which involved the plaintiff's status from a standpoint of fact. Here we have the conflicting opinions of a naval board upon practically the same record. The plaintiff presents new evidence of sufficient probative effect to at least raise a convincing and reasonable doubt as to the accuracy of the last findings and reports; or, what is of more importance, the substantive and true cause of plaintiff's physical disabilities, a new and

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additional record concurred in by at least one important official who had concurred in the former adverse finding. The Secretary of the Navy in 1924, believing that an injustice had been done the plaintiff, after reviewing the new record in its entirety, approved a report reversing the former ruling of his predecessor. This we think under the decisions he was clearly authorized to do.

We think the plaintiff is entitled to a judgment for the sum of $1,812.72. Judgment for that amount is awarded. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

STANDARD STEEL CAR CO. v. THE UNITED STATES

[No. A-307. Decided May 6, 1929]

On the Proofs

Contracts; delay by Government; suit for fixed profit.—Where delay in completion of a contract is due in part to the Government, which has made changes in specifications and by agreement continued the contract in force, failure to complete the work within the time originally agreed upon is no defense to a suit for balance of fixed profit.

Same; mutual delays; liquidated damages; lack of fixed date for completion.—Where delays have been caused by both parties to a contract resulting in the work not being completed until after the contract period, there is no longer a fixed date for completion. There being no date from which the time can be reckoned, liquidated damages for such delays can not be allowed.

Same; conflicting provisions, general and specific.—In the absence of some reason to the contrary general provisions in a contract must yield to later specifications when in conflict therewith.

Same; ascertainment of overhead; absence of rule; practice of parties dum fervet opus.—Where a cost-plus contract contains no definite rule for ascertaining overhead, the rule used by the parties in the calculation of payments made during the progress of the work is controlling.

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Same; "materials"; "facilities."—The term "materials" as used in a contract ordinarily does not include machinery, jigs, fixtures, or tools.

Interest on counterclaim.—Where in suit against the United States an item of a counterclaim is one among many in an unsettled open mutual account and there was no expectation of payment until settlement of the whole controversy nor evidence of demand which would fix the time from which interest on the item might run, interest is not recoverable.

The Reporter's statement of the case:

Mr. William B. King for the plaintiff. *King & King* were on the briefs.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

This case was originally decided March 11, 1929. On motion of plaintiff certain amendments to the special findings of fact were made May 6, 1929. The special findings as amended, together with the original and supplemental opinions of the court, are as follows:

I. Plaintiff is a corporation organized under the laws of the State of Pennsylvania and engaged in the business of manufacturing railroad cars and other products chiefly of steel in Pennsylvania and other States.

II. On October 29, 1917, an order was issued to the Standard Steel Car Company by authority of the Secretary of War, for the manufacture of certain gun carriages; and, on November 21, 1917, a further order was issued to plaintiff for the manufacture of an additional number of gun carriages. Before the receipt of either of these orders, the plaintiff, upon information that an order would be given it, began preparation for the manufacture of the gun carriages aforesaid, and upon receipt of the orders immediately accepted them. These two orders were subsequently merged in the contract referred to in the next finding of fact.

III. A written contract bearing the date October 29, 1917, was prepared thereafter by the Ordnance Bureau for signature of the parties, embodying the terms of said purchase orders and other details for the manufacture of the carriages aforesaid, to the total number of 1,150 provided in

both of the foregoing orders, and signed by plaintiff and the duly authorized agents of the defendant. This contract included by reference a pamphlet issued by the defendant entitled "Definition of 'Costs' Pertaining to Contracts," hereinafter referred to in Finding VII, being Exhibit "D" attached to the petition and made a part hereof by reference.

IV. The parties subsequently executed two supplemental articles of agreement and three supplemental contracts as follows:

Supplemental articles of agreement, dated April 23, 1918, providing for the manufacture of 49 additional gun carriages, bringing the total up to 1,199, and extending the date of delivery to October 15, 1918.

Supplemental articles of agreement, dated July 6, 1918, referring to matters in connection with a certain patent not in controversy in the case.

A supplemental contract, dated September 21, 1918, for the manufacture of certain articles for use in connection with the said gun carriages.

A supplemental contract, dated November 12, 1918, providing:

(1) For the furnishing of 150 trunnion bracket steel castings by the United States instead of by the contractor;

(2) The acceptance of the first carriage provided for in the contract of October 29, 1917, as a sample, not subject to the usual specifications of the contract;

(3) For the manufacture of certain other articles for use in conection with the carriages;

(4) Revoking $1,401.75 of the allotment of $990,000.00, provided in section (b) Addenda to Article IV of the original contract.

A supplemental contract dated January 22, 1919, increasing the total allotment for facilities to $1,068,580.53, and providing that the United States shall have one year after the termination of the present emergency, as evidenced by a proclamation of the President, to remove all increased facilities installed under this contract which were the property of the United States, and that the contractor be paid a reasonable dead storage rental for storage of the same in the meanwhile.

All of the Supplemental articles of agreement and supplemental contracts provided that, except as therein modified, all the terms and conditions of the original contract of October 29, 1917, should remain in full force and effect.

V. At the time when the orders and contracts above referred to were made, plaintiff controlled by ownership the majority of the stock of a large factory at Worcester, owned and operated by the Osgood Bradley Car Company, a corporation which manufactured railroad and street railway cars; and it was understood by defendant's officials who conducted the negotiations of the contract and plaintiff that the work ordered and contracted for could be done at the plant of the Osgood Bradley Car Company, and in accordance with this understanding the work was done by said company. No assignment was made of the contract. The Osgood Bradley Car Company acted as the agent of the plaintiff in carrying out the contract. The president of the plaintiff company, chairman of the board of Osgood Bradley Car Company, and McKee, assistant to the president of Osgood Bradley Car Company, both cooperated in supervision of the work in order to facilitate its completion under the contract.

VI. On December 18, 1918, plaintiff was notified by defendant not to manufacture or deliver any further articles or materials under the contract except to complete delivery (including deliveries before made) of 600 of the gun carriages. The plaintiff made no protest against this reduction in the number of carriages to be manufactured by it under the contracts, but took immediate steps to comply with the suspension notice.

Plaintiff delivered gun carriages to the total number of 600, besides the sample carriage provided for by the supplemental contract, in accordance with the table below:

July 20 to August 29, 1918	12
August 30 to September 26, 1918	32
September 27 to October 24, 1918	24
October 25 to October 31, 1918	36
November 1 to November 28, 1918	64
November 29 to December 26, 1918	50
December 27, 1918, to January 2, 1919	30

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January 3 to January 30, 1919	64
January 31 to February 27, 1919	45
February 28 to March 27, 1919	55
March 28 to April 24, 1919	65
April 25 to May 29, 1919	95
May 29 to June 12, 1919	28

VII. The contract, dated October 29, 1917, contained, among others, the following provisions:

"*Articles contracted for*

" Eleven hundred and fifty (1,150) 155-mm. howitzer carriages, model of 1918 (Schneider), complete.

"*Addenda to Article IV.* * * *

"(*b*) The contractor is hereby authorized to expend an amount not to exceed $990,000.00 for increased facilities at the plant of its subsidiary company, the Osgood Bradley Car Company, Worcester, Massachusetts, for which it will be reimbursed by the United States. The contractor is also authorized to expend an amount not to exceed $50,000.00 for increased facilities for performing work under this contract in the plant of the John Bath Company, Worcester, Massachusetts, subject to all terms and conditions of this contract applying to the expenditure for increased facilities in the plant of the Osgood Bradley Car Company, and the United States will reimburse the contractor for such expenditures.

* * * * * * *

"*Schedule 1*

"(*a*) Manufacture must be in accordance with general specifications governing the manufacture of gun carriages, artillery vehicles, and similar ordnance material, as contained in the pamphlet entitled 'Instructions to Bidders and General Specifications Governing the Manufacture and Inspection of Gun Carriages, Artillery Vehicles, and Similar Ordnance Material, Form 434, revised March 15, 1917,' 'Special Specifications Governing the Manufacture of 155 mm. Howitzer Carriages, Model of 1918 (Schneider), dated October 20, 1917.' * * *

[Here follows a list of drawings 168 in number.]

"The contractor is to manufacture or provide all parts of this carriage except the recoil mechanism and other excepted articles shown in the following list of drawings, which articles will be supplied to the contractor by the

United States in quantities required to be assembled into the units contracted for.

[Here follows a list of drawings 31 in number.]

* * • * * * * *

"Article III. The contractor agrees to deliver the articles according to the schedule of deliveries set forth at the end of this article.

"* * * The contractor shall not be responsible for delays caused by acts of war, riot, incendiarism, and the like, or by strike, fire, storm, and the like, or by any act or default of the United States or other cause beyond the control or without the fault of the contractor, without, however, relieving the contractor from using his best efforts at the cost of the United States to remove such cause and to continue performance with the utmost dispatch whenever such cause is removed. * * *

"* * * the contractor, at the cost and risk of the United States, shall store the articles in such manner and for so long a period not exceeding one year after acceptance by the contracting officer (which acceptance in such case shall constitute a delivery for the purpose of payments hereunder), as the contracting officer shall request, providing such space and buildings as may be desirable for adequate and safe storage, and in determining such cost, the rental for the use of land and buildings of the contractor shall be determined as hereinafter in Article X hereof provided; * * *.

"*Schedule of deliveries*

"Delivery to begin about April 1, 1918, and to continue at an approximate rate of seven (7) carriages per day, contract to be completed not later than October 1, 1918.

"Article IV. The United States will make the following payments to the contractor:

"(1) The sum of $900.00 for each unit delivered, as a fixed profit, 90 per cent of which shall be paid upon the proper certificate of the contracting officer showing delivery and acceptance of units during the performance of the contract, and the remainder upon the completion of the contract. Such fixed profit is subject to addition or deduction as hereinafter provided.

"(2) The United States shall add to fixed profit, or deduct from fixed profit, as the case may be, under the following adjustments:

* * * * * * *

"(*b*) In the event that the contractor shall fail to deliver the articles according to the schedule of deliveries provided for herein as complete articles, sets, or lots, as the case may be, the contractor shall be in default under this contract, which default shall continue until such time as such articles, sets, or lots shall be delivered. When one or more parts of an article, or articles of a set or lot, are not delivered by the proper date the complete article or the entire set or lot shall be classed as undelivered for the purpose of computing liquidated damages. For each day during which the contractor shall be in default on account of such deliveries, the United States shall deduct from the payments to be made to the contractor on account of fixed profit 1-10 of 1 per cent of the amount named as fixed profit in paragraph (1) of this Article IV for each article or set or lots of articles, with respect to which the contractor shall be in default. The United States may also deduct from the payments to be made to the contractor on account of fixed profit such additional cost of inspection and superintendence, if any, as may be caused by any default of the contractor; provided, however, that in no event shall such deductions, or either of them, cause the fixed profit, as finally paid to the contractor, to be less than the sum of $800.00 per unit. It is understood and agreed that if the United States shall elect to terminate this contract as provided in Article IX hereof, the aforesaid deductions shall be made only for each day prior to such termination, and that unless the United States shall so terminate this contract the contractor shall proceed to complete the delivery of articles with the utmost dispatch, and that such deduction of 1-10 of 1 per cent of fixed profit for each day of default is not imposed as a penalty, but as a liquidation of actual damages which according to a careful and reasonable estimate the United States will sustain if deprived of the use of the articles, set, or lots during the period for which deduction is made; provided, however, that the contracting officer shall extend the time for delivery of any articles for a period equal to any delay or delays caused in his opinion by any act of the United States, or by acts of war, riot, incendiarism, and the like, or by strike, fire, storm, and the like, or other cause beyond the control and without the fault of the contractor occurring during such time as the contractor may not be in default or before the expiration of any previous extension of the time for delivery of any articles, and no deduction from fixed profit shall be made for delay directly arising from any such cause.

"(3) The cost of the articles as allowed and determined in accordance with Article V hereof shall be paid from time

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to time, but at least once a month, upon the proper certificate of the contracting officer.

* * * * * * *

"Article V. The allowances of the cost to the contractor of the articles, for which the United States shall pay, and the elements included in the term 'costs' as used in this contract are as follows:

"(1) The cost of all direct labor paid for by the contractor and used in the production of the articles contracted for herein.

"(2) The cost of all direct materials contained in or forming part of the articles contracted for herein.

"(3) Pro rata share of factory overhead expense applicable to and necessary in connection with the manufacture of the articles contracted for herein.

"(4) Pro rata share of administrative and general expenses applicable to and necessary in connection with the manufacture of the articles contracted for herein.

"(5) The cost of jigs, fixtures, and test tools shall be considered as part of the cost of articles, and they shall belong to the United States.

"The foregoing paragraphs Nos. 1, 2, 3, and 4 are subject to further amplification as contained in the 'Definition of cost pertaining to contracts' to be supplied by the Finance Division (Accounting Section) of the Ordnance Department, to which reference is hereby made for the guidance of the contracting officer and the contractor as to the specific items of cost, which will be allowed under the foregoing four general definitions. As conditions arise necessitating changes or modifications in the definitions referred to the contracting officer will furnish the contractor with information in regard thereto.

"In addition thereto further allowances of cost from time to time may be made by the contracting officer.

"The United States shall not be obligated to reimburse the contractor for any expenditures relating to the performance of this contract unless the approval of the contracting officer shall have been obtained.

* * * * * * *

"The determination of the actual costs as herein allowed shall be made by the contracting officer, * * *.

"The decision of the contracting officer on all questions of the allowance and determination of cost and the payment thereof shall be final, except that either upon the completion of the contract by the contractor, or its termination by the United States, or whenever claims of cost amounting in the aggregate to $250,000.00 shall have been disallowed or

determined adversely to the contractor by the contracting officer, the contractor may appeal to the chief of ordnance by filing one statement of claim which shall embrace all claims of cost previously disallowed or adversely determined, provided that all such claims shall be certified by an accountant designated by the contracting officer as being in their entirety the subject of expenditure of, or cost to, the contractor.

* * * * * * *

"Article VII. It is agreed that the contracting officer may, by written notice to the contractor, make changes in the drawings and specifications forming part of this contract. * * *

"Article VIII. The United States shall have the right to order at any time before the completion of this contract and the contractor shall thereupon supply additional articles under the terms of this contract, upon the same terms as to fixed profit and other payments, or at such reasonable advance upon fixed profit as may be fixed by the contracting officer; the articles to be delivered upon the dates fixed by the contracting officer or as near thereto as the contractor's best efforts will allow. * * *

"Article IX. In the event that in the opinion of the Chief of Ordnance the public interests so require, this contract may be terminated by notice in writing to the contractor, without prejudice to any claim the United States may have against the contractor.

"In the event of the termination of this contract as aforesaid, the United States shall pay the contractor all costs and obligations of the contractor theretofore incurred and not previously paid, which may be allowed pursuant to Article V hereof, together with the fixed profit herein provided upon all articles previously delivered and accepted.

"In addition thereto the United States shall make the following payments under the following condition.

"In the event that the contractor shall not be in default under this contract at the date of such termination, the contractor shall be paid a sum which together with all fixed profit theretofore paid shall be equivalent to ten (10) per cent of all cost which the United States shall have previously paid, and shall then be obligated to pay, except the cost of raw material, supplies, and the like, which shall have been purchased by the contractor for use in the performance of this contract but shall not have been used in making the articles delivered and accepted. * * *

"Article X. Upon the completion of this contract, whether by the contractor or by the United States, or the termina-

tion of the contract without further performance thereof in accordance with Article IX hereof, or from time to time during the performance of this contract, the contractor agrees to make such disposition, at the expense and for the account of the United States, of unused material, supplies, and the like, scrap, waste, or defective material, rejected articles, and generally all property which shall have been paid for by the United States, as the contracting officer shall in writing direct; such direction to be given during the performance of this contract or within 60 days after its completion. If permitted by law, any of the foregoing property may be sold to the contractor by the contracting officer upon terms mutually agreeable. If the contractor is thereby required to store such property, the cost of storage and all costs incident thereto shall be from time to time paid to the contractor by the United States. If land and buildings of the contractor are used for storage, the United States shall pay to the contractor a reasonable rental therefor, as may be mutually agreed upon, or if agreement is impossible, as may be fixed by the Chief of Ordnance, but in no event to exceed ten per centum per annum of the cost of such land and buildings to the contractor, or a proportion of such cost according to the proportion of land and buildings used. It is agreed that the foregoing provisions as to rental shall apply to any storage of the articles in accordance with Article III hereof."

VIII. When the notice of December 18, 1918, referred to in Finding VI, was received, beside the sample gun carriage 214 of the completed gun carriages out of the 1,199 which had been contracted for had been delivered to defendant, the material for the contract number of gun carriages had been largely delivered to plaintiff, carriages in various stages of completion were on the floor of the shops, semicompleted parts were in practically all stages of completion and raw material was in the shops which had not been started in production.

This notice resulted in cancellation of outstanding orders for materials, stopping of production on all items in excess of the reduced number of carriages, rearrangement of the working schedule in the shops, and negotiation of settlements on all unfinished subcontracts.

IX. After informal negotiations, beginning as early as December, 1918, plaintiff, on the 28th day of June, 1919, made application under the act of March 2, 1919, to the

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Secretary of War for adjustment, payment, and discharge of the agreements aforesaid in accordance with the procedure established by the Secretary of War for this purpose under said act and presented his claim thereunder.

In the subsequent proceedings in this claim by the various tribunals of the War Department and by the Secretary of War the claims were treated as one under the act of March 2, 1919.

The successive claims as presented to the Boston District Claims Board were for the following sums:

Claim of June 28, 1919:	
Undisputed and voucherable items	$828, 795. 93
Items for action of claims board	698, 741. 60
Total	1, 527, 537. 53
Amendments in 1919:	
Undisputed and voucherable items	828, 795. 93
Items for action of claims board	747, 633. 14
Total	1, 576, 429. 07
Claim of March 30, 1920:	
Undisputed and voucherable items	54, 090. 00
Items for action of claims board	1, 253, 314. 40
Total	1, 307, 404. 40
Claim of May 18, 1920:	
Items not chargeable to this contract	257, 606. 62
Items for action of claims board	1, 330, 159. 92
Total	1, 587, 766. 54

The claim of the plaintiff was first heard and adjudicated by the Boston District Claims Board. The said board on consideration of the claim and of the counterclaim of the United States found, on May 29, 1920, that there was a balance due to the United States from the plaintiff of $187,760.54.

Thereupon an appeal was taken by the plaintiff from the findings of the Boston District Claims Board to the proper tribunals of the War Department set up by the Secretary of War to hear such appeals, and after hearing by the Claims Board of the War Department and other tribunals and officers of the War Department, an award

was made by authority of the Secretary of War and signed by ordnance section of the War Department Claims Board on January 17, 1921, in favor of the contractor for the sum of $36,386.53. Said award was declined by the plaintiff, who notified the Secretary of War that it was not prepared to accept the sum and asked for a revision. The Secretary of War, upon the consideration thereof, confirmed the action of the War Department Claims Board aforesaid by an order signed by him on May 23, 1921. Plaintiff thereupon notified the Secretary of War that it did not propose to accept the claim. On August 25, 1921, the Secretary of War issued an order that the award heretofore made be vacated and an order denying relief be entered into so far as the War Department is concerned. The plaintiff thereupon, on November 4, 1921, filed its petition in this court under the authority and terms of the Dent Act, praying judgment to the amount of $703,043.28.

X. The following items in favor of the plaintiff (except the last) are included in the allowance made by the Boston District Claims Board and in the award recommended by the ordnance section of the War Department Claims Board, also affirmed by the Secretary of War, and are now uncontested:

Vouchered items	$74, 902. 05
Crofoot Gear Works (by judgment against plaintiff—paid)	15, 473. 12
Strong Steel Foundry Co., accepted castings	3, 912. 10
Strong Steel Foundry Co., rejected castings	4, 968. 09
Sharon Iron & Metal Co. account	973. 91
Storage rental allowed by board	4, 529. 31
Bonus to salaried employees	14, 614. 77
Premium on bond (uncontested but not included in award)	5, 200. 00
Total uncontested	124, 573. 35

Under the provisions of Article IV, paragraph (1), of the contract, payment was made upon delivery of each of 601 completed gun carriages of 90 per cent of the sum of $900 fixed as a profit upon each gun carriage by said article. The remainder of 10 per cent, amounting to $54,090, retained as provided in said article to be paid "upon completion of the contract," has not been paid.

After the delivery of the last gun carriage on June 12, 1919, the Government used the land and buildings of the contractor until the close of December, 1919, for storage of materials, supplies, and other property of the United States purchased under the contract. A reasonable rental for such storage not exceeding 10 per cent per annum of the value of such land and buildings in proportion to their use is $4,529.31.

XI. Plaintiff paid for labor after May 31, 1919, and has been reimbursed for such payments as follows:

Productive labor upon the gun carriages delivered	$3, 146. 13
Removal of facilities belonging to the United States	5, 016. 38
Shipping component parts and machinery belonging to the United States	35, 110. 89
Total	43, 273. 40

No payment has been made of overhead and administrative and general expense appurtenant to this labor.

Claim was made on the above account in the original claim dated June 28, 1919. It was included in the finding of the Boston board and ordnance section of the War Department Claims Board and embraced in the total of the award of the Secretary of War, and allowed in part on the following basis:

167.64% on $3,146.13 (productive labor)	$5, 274. 17
167.64% on $5,016.38 (removal facilities)	8, 409. 46
10% on shipping labor	3, 511. 09
	17, 194. 72

The percentage of 167.64 was the percentage of overhead to direct labor in May, 1919.

The percentage of 10 per cent for overhead on shipping labor was arrived at in the following manner:

The total labor in the plant from November, 1917, to May, 1919, was found. The plant transportation department and the motor trucks and stores department were departments performing labor similar to the labor herein charged for. The total overhead in these departments for the same period was found. That bore a ratio of 9.73 per cent to the total labor in the plant. The overhead involved in this item has been computed by the Government upon

a ratio of 10 per cent and plaintiff credited with 10 per cent thereon.

The amount awarded by the Secretary of War for overhead, administrative, and general expense, in connection with productive labor and labor in the removal of facilities in the sum of $13,683.63, as stated above, was a reasonable allowance. In connection with the shipping labor referred to above, a reasonable allowance for the same matters is 60 per cent of the amount thereof ($35,110.89), which is $21,066.53, making a total of $34,750.16.

XII. From the time when the contract was taken by plaintiff until the completion of the work thereon, the Osgood Bradley Car Company had work other than that upon the gun carriages in the construction of railway cars.

The work on these cars represented in November and December, 1917, and January, 1918, about a fifth of the capacity of the plant; in February and March, 1918, about a ninth; and in April about a fifteenth.

Plaintiff also had other work, as follows:

(1) Contracts for making heavy chain for the war needs of the French Government on shipboard, beginning about October, 1917, and extending to November, 1918.

This involved less than 5 per cent of the force in the plant and was a very small department, with much less expense of supervision and inspection than the company's usual work and consequently a lower overhead rate.

(2) Some minor contracts for small repairs.

(3) Some additional commercial work taken on in May and June, 1919. This additional commercial work was a very small fraction of the capacity of the plant.

When the plaintiff sought its first reimbursement for costs, the distribution of factory overhead and general and administrative expense was submitted by the Government's accountants in accordance with the first method of distribution of the same set out in "Definition of 'Costs,'" paragraphs 33–35, inclusive. This method of distributing overhead was continued throughout the entire period of the contract.

While at different times there were questions raised by the representative of the plaintiff as to the items that were

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to be included in determining the distribution of overhead, there was at no time any question raised as to the method used for arriving at distribution of overhead costs, and while the method was never changed during the period of the contract, many of the items were subsequently altered so as to give additional credit or debit to the plaintiff or to the United States.

XIII. During the period of the contract, the Osgood Bradley Car Company borrowed large sums from various banks and bankers and from the Standard Steel Car Company.

These were borrowed by the Osgood Bradley Car Company for the needs of its business in general without being set aside in any particular for the Government contract embraced in this suit or for any particular part of this contract.

Interest was paid on these loans by the Osgood Bradley Car Company.

Interest was allowed upon current vouchers upon money borrowed for the purchase of direct and indirect materials (jigs, fixtures, and test tools), but no allowance was made for interest upon money borrowed for the purchase of materials included under the head of increased facilities either on current vouchers or on the claim presented to the War Department. The interest paid on loans obtained for the purpose of purchasing increased facilities, excluding the amount borrowed from the Standard Steel Car Company, was $11,350.03.

XIV. Applications were made by the plaintiff for extensions of time, and the contracting officer extended the time for delivery as follows:

Number of days' extension requested	Date requested	Date extension was granted	Causes
	1918	1918	
1	Jan. 11	Jan. 30	No power.
4	Jan. 28	Feb. 4	No coal.
2	Jan. 22	Feb. 6	Instructions from Fuel Administration.
48	Apr. 17	Apr. 25	Late delivery of steel castings, bronze castings, bar stock for drop forgings and screw machine parts.
23	July 5	Sept. 5	Late delivery of steel castings, drop forgings, and screw machine parts.
78			

On October 10, 1918, the Ordnance Bureau wrote plaintiff in further reply to its application of July 5 for extension of time and for cancellation of the liquidated damage clause, that "contracts containing the liquidated damage clause will not be amended by this office to extend the delivery dates," but that if "the delays were caused by conditions for which the contractor can not be held responsible, claim should be made on forms to be officially furnished." In response to request therefor such forms were sent plaintiff on October 23, 1918. On October 31, 1918, claim was filed on such form for 23 days' delay from June 6 to June 30, 1918 (repeating the claim of July 5, 1918, aforesaid), on account of nondelivery of steel castings, drop forgings, and screw machine parts by subcontractors. This application was returned to plaintiff by the inspector of ordnance on November 13, 1918.

On October 23, 1919, plaintiff notified the Boston claims board that it claimed six months' delay, besides those already allowed, due to the fault of the Government for the following causes:

Delivery of steel castings.

Furnishing parts to Mosler Safe Co.

Delivery of drawings of jigs and fixtures.

Delivery of recuperators.

Changes in design of fixed spade.

The board on October 28, 1919, sent blank forms to plaintiff for submitting claims for relief from liquidated damages. On November 14, 1919, plaintiff presented a claim on a single official form, with explanations, for 180 days' delay for the above causes. The board told plaintiff on November 19 that each cause must be separately stated on an official form. Claims were submitted as required on separate forms on December 11, 1919, in which the length of delay was set forth for each cause, as follows:

	Days
Nondelivery of French drawings	75
Steel castings	46
Parts to Mosler Safe Co	7
Fixed spade brace	12
Recuperators	30
	170

On January 5, 1920, the board asked for details of dates when these delays were effective.

On January 7, 1920, following a conference on the subject on December 30, 1919, claim was also asserted of delay caused by errors in dimensions and tolerances in the French drawings furnished plaintiff for manufacturing the gun carriages extending up to November 14, 1918, curtailing capacity by one-third.

On January 8, 1920, the board called plaintiff's attention to the need of more specific dates, and plaintiff on March 30, 1920, furnished a complete revision of its entire claim, including the following causes and periods of delay:

Lack of drawings of jigs and fixtures: 75 days between December 1, 1917, and March 25, 1918.

Errors in dimensions and designs: 90 days between November, 1917, and October, 1918.

Uncertainty of information: 30 days throughout the contract.

Delays in settling material requirements: 90 days between November 7, 1917, and August 22, 1918.

Delays in furnishing information: 30 days during the entire period of the contract.

Steel castings: 163 days from November 12, 1917, to early fall of 1918 (beside 78 days already allowed).

Parts to Mosler Safe Co.: 7 days in October, 1918.

Fixed spade brace: 12 days between September 26, 1918, to end of contract.

Recuperators: 30 days between June 5 and September 9, 1918.

A total of 527 days beside 78 days already allowed.

These delays, it was stated, ran concurrently in many instances.

No extension of time or other allowance for delay was made than as above set forth of 78 days.

The above is a complete statement of all applications for extensions of time, and of all allegations of delay and of the action thereon.

On November 20, 1918, plaintiff wrote the Boston Ordnance Office of the defendant a letter addressed to the production manager thereof advising him that to comply with

the rulings of the Ordnance Department, an 8-hour working schedule had been made effective which would interfere with the delivery of the articles called for in the contracts, and requesting that the articles of the contracts covering liquidated damages be eliminated.

The extensions of 78 days made up to September 5, 1918, as hereinbefore stated, brought the final date of delivery from October 1 under the original contract to December 18, 1918; or, if additional time is allowable under the supplemental agreement, from October 15, 1918, to January 1, 1919.

XV. Plaintiff placed orders on November 12, 1917, for steel castings, subject to the approval of the Ordnance Bureau, with the Strong Steel Foundry Company, of Buffalo, New York. Plaintiff was ordered on November 28, 1917, to hold action on this order and on December 4 and 7, 1917, to place the order for steel castings with the St. Louis Frog & Switch Company on account of lower prices. Objection was made by plaintiff to withdrawing the order from the Strong Steel Foundry Company, because it had previous experience with this company and considered it to be prompt and reliable. Plaintiff then placed the order with the St. Louis Frog & Switch Company for the whole number of large castings required solely because of the Government order requiring it. Said company was not able to deliver the castings with any degree of promptness.

On May 3, 1918, with the consent of the Government, a part of the order was replaced with the Strong Steel Foundry Company. At this late date that company had taken orders for other work that interfered with the rapid furnishing of these castings, and orders were placed with other companies, including a Canadian company.

The largest of these castings was for the trunnion bracket 120A. The gun carriages could not be completed for delivery until this casting was received and machined. It was difficult to obtain castings that could stand the Government test. Those at first furnished by the St. Louis Company were defective and those made by the Strong Company were better, but later on the best castings came from the St.

Louis Company. The Strong Company also had many castings rejected. By August 19, 1918, there were sufficient of the castings (120A) for present needs, and on November 5th following there was an ample supply.

XVI. The original French plans provided that the fixed spade brace should be of forged steel. In the specimen French carriage furnished for plaintiff's use it was forged steel. The plans furnished plaintiff by the War Department provided a fixed spade brace of cast steel.

Upon trial at the Aberdeen proving grounds by the Ordnance Bureau of the sample carriage, delivered July 20, 1918, the spade brace failed.

On September 26, 1918, plaintiff was notified of this failure and directed to change the spade braces to forged steel "as soon as possible without delaying production," in the meantime using a modified cast-steel brace of reinforced design to be furnished by the Watertown Arsenal, which should be delivered within two weeks.

Unexpected delays occurred in furnishing the strengthened braces from the Watertown Arsenal and the department between September 26 and November 1 ordered a reinspection of those already delivered of the original cast-steel braces and allowed the better castings to be used, and the carriages to which they were attached were accepted.

These modified braces were not furnished until about November 1, 1918. Only a few of the forged-steel braces were received until the latter part of October, when thirty-seven were delivered, about seventy-two in November, and about three hundred seven in December, and from then on as required.

These conditions required some careful reexamination of the cast-steel spade braces already delivered, and cutting from the carriages of cast-steel braces already affixed, the machining of additional spade braces to take the place of those already affixed which either failed on test or were considered unsuitable in the light of this experience, the preparation of new and larger jigs for the reinforced spade braces and of tooling equipment for these and the forged-steel braces, the holding up of machining operations on the

plates already received, the arrangement for a source of supply for the forged-steel braces, and the breaking down of manufacturing and assembling schedules.

XVII. The finish and fittings of the parts of this gun carriage, especially in view of the need of interchangeability of parts, were extremely refined and delicate work.

Drawings of the utmost refinement and of perfect accuracy are needed for such work in advance of requisitioning materials or beginning production.

Drawings were furnished to plaintiff by the War Department for estimating in September, 1917, and contract drawings were forwarded to it with the contract on October 29, 1917.

Plaintiff discovered numerous errors in these drawings in the course of examining them for the purpose of designing jigs and fixtures and for ordering materials and for making working drawings and in the course of manufacturing the parts and assembling the manufactured parts.

These discoveries of errors continued from November 15, 1917, to November 1, 1918.

When discovered, these errors had to be reported in writing to the inspector of ordnance at the works and by him reported to the War Department and authority obtained from the War Department to make the necessary corrections, the corrections made as authorized and the revised drawings approved by the War Department.

The first request for extension of time on account of errors in drawings was made on December 30, 1919.

XVIII. Plaintiff was prepared by June 5, 1918, to use and needed for use, the recuperator or recoil mechanism, one of the excepted parts to be furnished by the Government, and requested on May 21 that it should be furnished upon the date first above mentioned in this finding.

The cradle in which the recuperator is assembled is one of the most difficult parts of the gun carriage because of the close tolerances.

A partly finished recuperator was delivered to plaintiff on July 17, 1918, but it functioned unsatisfactorily because not fully completed and it was discarded. A number of car-

riages were, however, accepted without the recuperator being fitted and were sent to the proving grounds.

Efforts were made to obviate the need of a recuperator by manufacturing tools for gauges, but these were not satisfactory, and finished cradles then in the shop had to be worked after tests at the Aberdeen proving grounds.

The first completed recuperator was received on September 9, 1918, and after its receipt changes had to be made in all the finished cradles then in the shop, including those already once changed as aforesaid.

XIX. In the execution of this work both a day and night shift were employed, working 21¾ hours a day under the suspension of the 8-hour law in the naval appropriation act and the presidential proclamation of March 24, 1917, embodied in the contract herein.

On November 13, 1918, a notice was issued to all contractors to the effect that night work should be ceased as soon as it could be accomplished without hasty or inconsiderate discharge of employees.

The plaintiff received this notice and in compliance therewith an 8-hour schedule was put in force and the night shift gradually dispensed with; but plaintiff, on November 20, 1918, notified the Boston office that this order would interfere with the deliveries under the contract and asked that the section providing for liquidated damages be eliminated.

XX. Delays in production were caused on the part of the plaintiff by a lack of machine-shop equipment, a failure to have jigs, templates, and gauges prepared as they were needed, and by the length of time consumed in perfecting the shop organization. The evidence shows that these delays were considerable in extent, but it fails to show the proportion of the delay which was thereby caused. It also appears that these delays were concurrent with delays caused by the defendant. On August 3, 1918, the president of the plaintiff company wrote a letter stating that it needed thirty-four machines, including lathes, planers, drills, and reamers, in order to make an average of seven carriages per day as provided in the contract.

XXI. On December 18, 1918, two hundred and fourteen (214) gun carriages were delivered. The remaining three hundred and eighty-six were delivered from time to time from then to June 12, 1919, when the last delivery was made.

The Boston District Claims Board found there was due as liquidated damages from the plaintiff to the United States the sum of $49,537.20. The ordnance section of the War Department Claims Board made no deduction. The award of the Secretary of War made no deduction.

XXII. After the completion of the contract, statements of the amount claimed due by the United States to plaintiff were prepared by accountants, the cost of the work of said accountants amounting to $3,860.02.

The accountants so employed were J. Lee Nicholson, who had been prior to his employment and up to December 16, 1918, a major in the Ordnance Corps of the Army, and his assistants, who had prior to their said employment been in the service of the United States as follows: H. Huffnagel, formerly supervisor, cost accounting section, Bridgeport district ordnance office; J. G. Albinger and V. W. Roderique, formerly accountants of the Bridgeport district ordnance office.

Claim for this sum was presented as an item of the claim of June 28, 1919, and of the revised claim of March 30, 1920. It was disallowed by the Boston Claims Board January 5, 1920, because it was considered illegal to have employed the accountants in question, by reason of the provisions of Revised Statutes, section 190, and the act of July 11, 1919, 41 Stat. 131. No finding therefor was made by the ordnance section of the War Department Claims Board, nor does it appear in the award of the Secretary of War.

XXIII. The United States had paid previous to the completion of the work under the notice of termination of December 18, 1918, and was then obligated to pay, less the cost of raw material, supplies, and the like purchased by the contractor for use in this contract but not so used, the total sum of $5,992,970.17. This total does not include the claim of $29,678.60 ($27,726.17 claimed in the petition) for re-

distribution of overhead or the claim of $3,860.02 for cost of preparing claim, both of which are rejected, and includes only $34,750.16 for overhead on plant restoration instead of $55,823.41 claimed by plaintiff.

The items constituting "costs" as defined by Article V of the contract amounted to $4,691,485.10.

XXIV. The cost of making disposition of unused material, supplies, and the like, scrap, waste, or defective material, rejected articles, and generally all property which had been paid for by the United States, as directed by the contracting officer through his representatives, was $44,917.28.

A claim for 10 per cent profit on costs so incurred was disallowed by the Boston Claims Board and the ordnance section of the War Department Claims Board and was not included in the award tendered by the Secretary of War to the plaintiff.

XXV. All property of the United States was kept as far as practicable separate and apart from property belonging to the contractor and other property in its possession and was marked as the contracting officer directed.

In operating, caring for, and storing property of the United States the contractor used its best efforts adequately to protect the same, and no loss thereof or damage thereto was caused by the willful default or negligence of the contractor.

XXVI. Plaintiff has accounted for all direct materials of the United States at any time in its possession.

XXVII. Plaintiff has accounted for all increased facilities of the United States at any time in its possession except for items of increased facilities, amounting to $268.73, for which it admitted that no accounting had been made, and expressed willingness to accept responsibility.

XXVIII. After the conclusion of the production work a large amount of the property of the United States, which had been purchased for use either for facilities or as direct material for use in production, was sold to the plaintiff by the contracting officer upon terms mutually agreeable. Said property remained in plaintiff's possession, and plaintiff has continuously had the use, benefit, and profit thereof.

The total sum agreed upon in payment was set out in the Boston District Board statement, the statement of the ordnance section of the War Department, and in the award of the Secretary as $144,145.16.

No portion of said sum of $144,145.16 has ever been paid to the United States.

The court decided that plaintiff was entitled to recover $127,396.64.

GREEN, *Judge*, delivered the opinion of the court:

It appears from the evidence without dispute that during the period of the war between the United States and the Imperial German Government the defendant entered into certain contracts with the plaintiff for the manufacture of 1,199 gun carriages on a cost-plus-fixed-profit basis. These contracts contained a provision whereby they might be terminated by the defendant, and after the active prosecution of the war had ceased the defendant exercised this right in accordance with the provisions of the contract, but authorized the plaintiff to proceed with the contract work to the extent of manufacturing a total of 601 of the gun carriages. This number of the gun carriages was completed by plaintiff and delivered to defendant but a controversy arose as to the amount due and owing to plaintiff. The parties having failed to come to any agreement as to the amount due the plaintiff under the provisions of the contract and the law as applied to such cases where the contract had been terminated by the Government, the plaintiff now brings this suit to recover $703,043.28, which it claims is due under the provisions of the contract and the law as applicable thereto.

The defendant not only denies that plaintiff is entitled to recover anything herein, but under the counterclaims which it has pleaded alleges there is a net balance due to it of $164,326.78, for which it asks judgment.

Of the items for which the plaintiff asks judgment in its petition, the following are uncontested:

(a) Vouchered items	$74, 902. 05
(b) Balance paid Crofoot Gear Works	15, 473. 12
(c) Erroneous deduction on account of Sharon Iron and Metal Co	973. 91

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(d) Balance due Strong Steel Foundry Co., on accepted material	$3,912.10
(e) Balance due Strong Steel Foundry Co., on account of defective castings	4,968.09
(f) Storage rental	4,529.31
(g) Bonus to salaried employees	14,614.77
(h) Premium on bond	5,200.00
Total uncontested	124,573.35

The following items of plaintiff's claim are contested:

(i) Redistribution of overhead	$27,726.17
(j) Overhead on rehabilitation cost	57,523.50
(k) Or, in the alternative, as allowed in the award $17,194.72	
(l) Interest on materials purchased for increased facilities	11,437.38
(m) Interest on material vouchers, paid after delay	7,111.16
(n) Interest on material vouchers not paid	3,000.00
(o) Losses by delay:	
(1) Damages due to prevention by Government of contractor's earning profits fixed by contract	539,100.00
(2) Or, in the alternative, compensation for delayed occupancy, $107,266.86.	
(p) Profit items:	
(1) Retained percentage upon profits paid	54,090.00
(2) 10% profit on total cost, including cost of facilities, $99,532.00, claimed only in the alternative in case the allowance of $539,100 is not made as damages for delay.	
(3) Or, in the alternative, profit on restoration costs, $10,739.68.	
(q) Occupation of plant after completion	23,296.17
(r) Accountants' cost of preparing claim	3,860.02

The items of defendant's counterclaims and set-offs are as follows:

(a) Property transferred to the plaintiff	$144,145.16
(1) Interest thereon to January 1, 1928	73,514.03
(b) Liquidated damages	48,197.80
(c) Increased facilities not returned to defendant	268.73
(d) Profit paid to plaintiff in excess of that allowable under termination clause of Article IX of contract	22,774.41
	288,900.13

Of these items, Items (a) and (c) are undisputed.

PLAINTIFF'S CLAIM FOR $54,090.00, UNPAID PORTION OF FIXED PROFIT [ITEM (P) (1)]

The contract between the plaintiff and the defendant provided for the payment by the Government of a fixed profit of $900.00 for each unit (gun carriage) delivered, 90 per cent of which was to be paid upon the certificate of the contracting officer showing delivery and acceptance, and the remainder upon the completion of the contract. This fixed profit was subject to addition or deduction as further provided in the contract; and if the contractor was in default he was made liable for liquidated damages and provision was made as to the method of computing the amount thereof which should be deducted from the payments made to plaintiff.

Ninety per cent of the fixed profit on the price of the gun carriages which plaintiff completed and delivered was paid to plaintiff by the defendant, and the remainder, $54,090.00, was withheld, is still unpaid, and plaintiff seeks to recover it. It is conceded by defendant in argument that if plaintiff was not in default this would be a proper item to be considered and allowed; but defendant insists that plaintiff was in default by reason of failure to deliver the gun carriages in accordance with the terms of the contract.

The contract read:

"Delivery to begin about April 1, 1918, and to continue at an approximate rate of seven (7) carriages per day, contract to be completed not later than October 1, 1918."

The first supplemental agreement for the manufacture of additional carriages extended the date of completion of the main contract to October 15, 1918, and subsequent extensions made by defendant allowed the plaintiff 78 days after the time prescribed in the contract. As the last delivery was made June 12, 1919, it is evident that delivery was not made as specified in the contract, even when all extensions are considered. The plaintiff, however, insists that this delay was the fault of the defendant, and even claims that the defendant caused it to lose a total of 527 days in addition to the extensions granted. At this point it becomes

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necessary to consider the evidence and certain provisions of the contract bearing on these conflicting claims.

The testimony taken in the case fills nearly two thousand printed pages, the greater portion of which relates to the matter of delays alleged to have been caused by the respective parties. This evidence is so conflicting, indefinite, and uncertain, that as to many important points we are able only to come to a negative conclusion that the evidence is insufficient to form the basis of a finding. It clearly appears that both plaintiff and defendant were responsible for matters that caused serious delay in the performance of the contract, and that there were delays for which neither was responsible, but the precise amount of delay to be apportioned to each can not be determined. Not only is the evidence in the very nature of things uncertain as to the extent of the delay, but the testimony given with reference to delays shows that for the most part they were concurrent; that is, while one was operating one or more other causes of delay were also taking place, and often delays caused by both plaintiff and defendant were operating at the same time. This situation renders it impracticable to determine how much effect each had in the way of postponing the final completion of the work, and utterly impossible to apportion delays or make findings of fact as to the amount thereof, caused jointly or severally by the parties. Consequently, at the outset we reach the conclusion that the extent of the delay caused by either plaintiff or defendant can not be determined from the evidence. For this reason we do not agree with the commissioner's finding in effect that the delays were largely caused by matters for which the defendant was responsible. Our reasons for this conclusion are more particularly set out hereinafter in discussing the evidence applicable to the various items of the claims of the respective parties.

The contract required the plaintiff to manufacture the articles described therein in accordance with certain specifications and ordnance office drawings, of which 168 were listed in the contract. Some of the work was of an extremely refined and delicate nature and accurate drawings

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were needed for its performance. While the contract does not so specify, we think there was an implied agreement on the part of the Government to furnish these drawings, and that without determining whether defendant was required to furnish drawings which in each and every instance were absolutely correct, it can at least be said that the defendant was under obligations to furnish drawings which were reasonably accurate. That it did not do so in many instances is apparent from the evidence. Drawings were furnished, but numerous errors were discovered therein, delaying designs for some of the jigs and fixtures, orders for materials, and preparation of working drawings. This necessitated a roundabout method of reports to obtain authority for corrections and corrected drawings and delayed manufacture until the corrected drawings could be obtained. (See Finding XVII.) Those errors were found up to about November 1, 1918.

In addition to the changes in the drawings and specifications made by reason of errors in those originally furnished, the defendant made changes for other reasons. It should be observed in this connection that many of these changes were made at the request of plaintiff for the reason that when made the work would be expedited and less time would be consumed than would have been taken had the original requirements of the contract been continued. The plaintiff, however, complains of delay caused by difficulty in obtaining information with reference to these changes as well as to those which were made by reason of errors, and the evidence on these matters is so inextricably intertwined that it is another instance of the difficulty of determining the respective degree or amount of delay to be charged to each party.

A change particularly complained of by plaintiff was in relation to the plans furnished for the fixed spade brace of the carriage, which originally required it to be made of cast steel. So made, the brace proved a failure. Plaintiff was not definitely notified of this failure and the change made necessary until September 26, 1918, when it was directed to use a modified brace to be furnished by the Watertown

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Arsenal. While a number of the better castings of the brace, as originally designed, were accepted by the defendant, none of the modified braces were furnished until about November 1, 1918, and a large number of them were not furnished until the following year. The defendant had the right under the contract to make changes in the specifications, but we think that when it made changes that created a serious delay, such as was caused in this instance, defendant lost its right to enforce the time limit for the delivery of the carriages. The effect of these changes in the way of requiring additional work and changes in the work already done is set out in detail in Finding XVI.

Another cause of delay needs to be considered, which was one for which the defendant was responsible.

In November, 1917, the plaintiff placed an order with the Strong Steel Foundry Company for certain steel castings. Shortly thereafter the Ordnance Department objected to the price fixed by this company and asked that the order be canceled and placed with the St. Louis Frog & Switch Company. Plaintiff objected, but complied with the request. The inability of the St. Louis Company to furnish the castings promptly as needed resulted in serious delay. A part of the order was replaced with the Strong Company and part also with the Canadian Foundry Company, but it was not until the forepart of November, 1918, that there was a sufficient supply of one of the most important castings—the trunnion bracket—without which the carriages could not be completed, and upon which other work depended. The defendant was under no obligations to furnish this casting, but it can not rightfully complain of delays resulting from its own interference with the operations of plaintiff.

The testimony does not show how far this action of defendant delayed the completion of the contract. It appears that there was difficulty in any event in obtaining castings which would pass the test required by the Government and while the Strong Company at first made the better castings, later on the better ones were made by the St. Louis Company. While the amount of the delay can not be de-

termined with any degree of exactness, it is quite evident that it interfered with the progess of the work in general and was an important factor in hindering the completion of the work.

It should also be observed that the parties made two supplemental contracts after the expiration of the time limit in the original contract. Each of these contracts provided that except as modified therein, the original contract should remain in full force and effect, and one contract, dated November 12, 1918, provided that defendant should furnish 150 of the trunnion brackets 120–A2. The other and last supplemental contract was dated January 22, 1919, and both of these two last named contracts provided for additional work being done by the plaintiff.

The recuperator was one of the parts which the defendant was bound to furnish and was needed in order to complete other parts expeditiously. The defendant failed to furnish this part in time, and a considerable number of the carriages were made and accepted without it. Lack of space forbids anything like a complete discussion of this delay, but it may be said that it was serious, although its precise extent can not be determined for many reasons.

For the same reason we do not discuss other changes made by defendant requiring construction work which was not provided by the contract.

The plaintiff claims that the defendant is responsible for other delays. Some of these claims are well founded and some are not. For example, plaintiff claims that a delay was caused by the failure of defendant to furnish the French drawings. The contract did not require the defendant to furnish these drawings and the delay, if any, by reason of the failure to furnish them promptly was slight.

Without going further on this point we think enough has been shown to make it evident that the defendant, by reason of delays for which it was responsible, by reason of changes from the original requirements of the contract, and by reason of the execution after the date fixed for completion of the work in the original contract of supplemental contracts continuing the original contract in force (to which

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further reference will be made in connection with plaintiff's claims for damages), can not use the failure to complete the work within the time limit of the contract as a defense against plaintiff's claim for the balance of the fixed profit. It is no answer to this to say that the evidence in relation to delays caused by defendant does not definitely fix the time lost thereby. There are numerous and well-reasoned decisions which hold that where there are mutual delays caused by the respective parties to the contract, the courts will not undertake to apportion the delay between the parties. See *Caldwell & Drake* v. *Schmulbach*, 175 Fed. 429; *Jefferson Hotel Co.* v. *Brumbaugh* (C. C. A.), 168 Fed. 867, and cases cited therein. True, these are all cases in which liquidated damages were asked on behalf of the plaintiff for failure to perform the contract in time, but the principle upon which the decisions are based is exactly the same, viz, that no definite date remains for the completion of the contract. In the first-named case it is said:

"The law is that courts by reason of the very uncertainty, the impossibility to fairly and justly determine the causes of such mutual delays and their effects, will not attempt to apportion."

In the case of *N. Y. Cont. Jewell Filtration Co.* v. *United States*, 55 C. Cls. 288, 296, which like the case at bar was one in which the completion of the contract within a stipulated time was prevented by delays caused by both parties, the court said:

"It is well settled that in cases where delays have been caused by both parties to a contract and the completion of the contract has thereby been extended beyond the time fixed, the obligation for liquidated damages is annulled, * * *."

and also,

"* * * the court has no fixed date from which the contract can be enforced, unless the court chooses to enter the domain of guesswork."

In *United States* v. *United Engineering Co.*, 234 U. S. 236, 242, in which, like the case at bar, supplemental contracts were entered into for additional work after the date

fixed for completion under the original contract, the court said:

"But the Government, as well as the claimant, saw fit to go on with the work with no fixed rule for the time of its completion, so that it be reasonable, and the Government required no stipulation in the second and third supplemental contracts as to damages in a fixed and definite sum for failure to complete the work as required."

and the defendant was held not entitled to recover liquidated damages.

The principle of these cases is that where delays have been caused by both parties, resulting in the work not being completed until after the expiration of the contract period, there is no longer a fixed date for the completion of the contract. For this reason, in the cases cited, the courts refused to allow liquidated damages, having no date from which the time could begin to run; and in the case at bar, there can be no default on the part of the plaintiff based on the ground that the contract was not completed within the period fixed therein. Under the circumstances, the plaintiff was only required to complete the contract within a reasonable time and there is nothing in the evidence to show that it did not make every reasonable effort to expedite the work.

DEFENDANT'S COUNTERCLAIM OF $48,197.80 FOR LIQUIDATED DAMAGES [DEFT.'S ITEM (B)]

All that has been said with reference to defendant's plea that plaintiff is not entitled to recover the fixed profit provided by the contract by reason of failure to complete the work within the contract time applies equally to defendant's counterclaim for liquidated damages, which is based upon the same allegations. If we are correct in the views above stated, it follows that defendant's counterclaim for liquidated damages can not be sustained and that plaintiff is entitled to recover the unpaid balance ($54,090) on the fixed profit of $900.00 per gun carriage accepted, unless defendant's claim that owing to the termination of the contract this profit should be otherwise computed in accordance with the provisions of Article IX of the contract is sustained, and this defense will next be considered.

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DEFENDANT'S COUNTERCLAIM OF $22,774.41 FOR OVERPAYMENT UNDER ART. IX [DEFT.'S ITEM (D)]; AND PLAINTIFF'S CLAIM OF $99,532.00 FOR UNDERPAYMENT UNDER SAME ARTICLE [ITEM (P) (2)]

The defendant claims that under the provisions of Article IX the plaintiff has already been overpaid in the sum of $22,774.41. The plaintiff, on the other hand, claims that when Article IX is correctly construed it has been underpaid in the amount of $99,532.00. For the purpose of determining the correct construction of Article IX it becomes necessary to analyze its provisions.

The first two paragraphs of this article provide that in case of the termination of the contract by notice from the defendant—

"the United States shall pay the contractor all costs and obligations of the contractor theretofore incurred and not previously paid, which may be allowed pursuant to Article V hereof, together with the fixed profit herein provided upon all articles previously delivered and accepted."

This is perfectly plain and there is no dispute as to its meaning.

The controversy arises over the proper construction of the words "all cost" in the two succeeding paragraphs which provide:

"In addition thereto the United States shall make the following payments under the following condition:

"In the event that the contractor shall not be in default * * * the contractor shall be paid a sum which, together with all fixed profit theretofore paid, shall be equivalent to ten (10) per cent of all cost which the United States shall have previously paid, and shall then be obligated to pay."

except the cost of materials and articles purchased by the contractor and not used in making the articles delivered.

The contention of the defendant is that the words "all cost" in the paragraph last set out mean the same as "all costs" in the preceding paragraph, which words are expressly limited to those included in Article V, and Article V in turn is made more definite by the pamphlet "Definition of 'Costs.'" All costs, as defined and limited by Article V,

amount to $4,691,485.10. See Finding XXIII. The contract having been terminated, if the defendant is correct in the construction of Article IX for which it contends, 10 per cent of that amount would be $469,148.51. The plaintiff has been paid as fixed profits $486,810.00, or $17,661.49 more than the amount to which it is entitled as defendant construes this article. On the other hand, if plaintiff's contention be sustained, and the language in the paragraph last quoted is taken literally and applies to "all cost which the United States shall have previously paid, and shall then be obligated to pay," the amount thereof is $5,992,970.17, of which 10 per cent is $599,297.02. The total amount of fixed profit, including what has already been paid and what is to be paid under the rules laid down, in this opinion, is $540,900.00. It follows that if plaintiff's construction is correct, there is in addition to the fixed profit due it under Article IX the sum of $58,397.02 ($599,297.02 minus $540,900.00).

The contention of the defendant is based upon the language of Article V and the amplification thereof in the pamphlet, "Definition of 'Costs' pertaining to contracts," and other provisions of the contract which will be referred to hereinafter. Article V specifically enumerates the "elements included in the term 'costs' as used in this contract." They constitute five items which are set out in Finding VII, and do not include the cost of increased facilities which make up by far the greater part of the sum upon which plaintiff claims to be entitled to 10 per cent under the provisions of Article IX.

As before stated, the elements included in the term "costs" as set out in Article V are further amplified in the pamphlet headed "Definition of 'Costs' pertaining to contracts." This pamphlet repeats the language of Article V with reference to the elements included in the term "costs" and also provides that:

"Temporary buildings, machinery, equipment, etc., purchased by the contractor * * * for use in connection with manufacturing the articles contracted for, * * *

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shall not be classified as direct materials, upon which any percentage of profit shall be paid to the contractor,"

and it may be said that the words "costs" and "cost" seem to be used in the contract interchangeably.

The contract also recites that:

"The decision of the contracting officer on all questions of the allowance and determination of cost and the payment thereof shall be final,"

and he did not approve any such allowance. The defendant therefore says that to include any other items than those which are specified by Article V in the list upon which plaintiff can have a percentage of profit is inconsistent with the other provisions of the contract and that the language used in the last paragraph of Article IX must be construed in accordance therewith.

Coming now to the construction contended for by plaintiff, it must be conceded that it is in conflict not only with one but with several provisions of the contract; but there is an inconsistency in any event no matter which construction is followed.

No construction can be given this paragraph which will be consistent with the other provisions of the contract. It will be observed that the first two paragraphs of Article IX provide for paying the plaintiff the fixed profit to which reference has heretofore been made, and that the next two paragraphs of Article IX apply when the contractor is not in default, and we have already found that it was not in default in any respect. These two paragraphs provide that the contractor shall be paid

"in addition thereto * * * a sum which, together with all fixed profit theretofore paid, shall be equivalent to ten (10) per cent of all cost which the United States shall have previously paid, and shall then be obligated to pay."

If defendant's contention be sustained, instead of being paid anything "in addition thereto," the contractor would suffer a deduction from his fixed profit. It is hardly possible that the parties intended, in event the contract was terminated before completion when the contractor had made all necessary preparation to carry it out, that the contrac-

tor should lose thereby. On the contrary, it is entirely reasonable that the contractor should be paid an additional sum under such circumstances, and we are at a loss to ascertain why this provision should be in the contract at all if anything otherwise was intended.

General provisions in a contract, when in conflict with particular specifications thereof, following later in the absence of some reason to the contrary, must yield to the latter. See 13 Corpus Juris pp. 537, 538, section 501. On the whole, we conclude that by reason of the termination of the contract, plaintiff is entitled to recover $58,397.02 above the amount of the fixed profit under the terms of Article IX.

PLAINTIFF'S CLAIM OF $10,739.68, AS PROFIT ON RESTORATION COSTS [ITEM (P) (3)]

The claim of plaintiff for $10,739.68 as profit on the cost of restoring plant, crating, and shipping Government materials must be rejected, as it is only asked in the alternative in event the claim for profit on total costs is not allowed.

PLAINTIFF'S CLAIM OF $539,100.00 FOR DAMAGES CAUSED BY DELAY [ITEM (O) (1)] AND PLAINTIFF'S CLAIM OF $107,-266.86 AS COMPENSATION FOR DELAYED OCCUPANCY OF ITS PLANT [ITEM (O) (2)]

The plaintiff also claims $539,100 as damages caused by delays for which the defendant is responsible and which it alleges prevented it from earning the profits which it would have made had it completed the contract and manufactured the whole number of 1,199 carriages within the time limit specified. The plaintiff also asks in the alternative compensation for delayed occupancy of its plant in the sum of $107,266.86. Both of these items are based on the theory that the Government has rendered itself liable by reason of the delay which it caused in the completion of the contract.

The facts in the case are very similar to those in the case of *Crook Co.* v. *United States*, 270 U. S. 4. In that case, as in this, the Government reserved the right to make changes and thus interrupt the continuity of the work. The time for

the completion of the contract was specified and liquidated damages were fixed for delays on the part of the contractor. The only reference to delays on the part of the Government is in the agreement that if caused by its acts they will be regarded as unavoidable. Plaintiff agreed to accept in full satisfaction for all work done under the contract the contract price, reduced by damages deducted for its delays. In these respects the contracts in the *Crook case* and the case at bar have the same provisions, and the Supreme Court said in the *Crook case*, with reference to the fact that no further provision was made regarding delays on the part of the Government, that:

"We are of opinion that the failure to exclude the present claim was due to the fact that the whole frame of the contract was understood to shut it out, * * *."

The Government was undertaking a new and exacting work during war time, when haste was necessary and difficulties were to be expected from the enormous demand made on all of the Nation's resources. For delays on its part there were certain provisions in the contract. There is much reason to believe that if anything more was intended there would have been a further provision with reference thereto. It is not necessary, however, to determine whether the rule laid down in the *Crook case* should be applied herein.

Neither do we find it necessary to pass on the validity of defendant's contention that this claim is one for anticipated profits. We think the condition of the evidence affords ample grounds for its rejection for lack of evidence to support it.

In order that the plaintiff may recover on its claim for profits that it would or might have made, it must establish by a preponderance of the evidence that but for a breach of some of the provisions of the contract, express or implied, it would have completed the contract in its entirety within the time specified together with extensions granted by defendant.

We have already found that there were delays for which the defendant was responsible. Assuming that this constituted a breach of the implied provisions of the contract,

it should be observed that there were other causes of delay, more or less serious, acting concurrently with the delays caused by the defendant. For some of these delays, the plaintiff was responsible, and for some neither party was responsible. There were delays for want of power, want of coal, want of materials and parts which defendant had not agreed to furnish, and delays on account of defective castings when the best obtainable were being received. There were also delays in completing the plaintiff's organization extending into the fall of 1918, and delays in manufacturing the jigs and dies. As late as August 3, 1918, a letter written by the president of the plaintiff company showed that it needed thirty-four important machines in order to make an average of seven carriages per day as provided in the contract. These machines were not machines of a special kind to manufacture special parts needed for the carriages. They were machines for work general in its nature, such as lathes, planers, drills, and reamers. How much delay the want of these machines caused can not be determined from the evidence, but it must have been considerable. When we consider all of these various matters which caused delay, the most of which were operating concurrently, it can be seen how impossible is the task of determining when the plaintiff would have completed the contract in its entirety if there had been no delays for which defendant was responsible. The claim for damages based upon delays for which defendant was responsible must therefore be rejected.

The alternative claim for delayed occupancy in the sum of $107,266.86 must next be considered. The defendant contends that plaintiff was in fact benefited by the continuance of the work, as it was thereby enabled to keep its organization intact during a period when it would have had no other work. Regardless of whether plaintiff was benefited or not, we think this claim must be rejected. There is no evidence that any other orders or work were tendered to plaintiff. It was fully paid for all overhead while the work was going on and making a profit besides. In any event, the evidence is too indefinite as to when plaintiff

could have finished the contract had there been no default on the part of the defendant. We think also the principle before stated with reference to the effect of mutual delays applies to this claim.

PLAINTIFF'S CLAIM OF $27,726.17 FOR IMPROPER DISTRIBUTION OF OVERHEAD [ITEM (I)]

Plaintiff also sets up a claim for $27,726.17 based on the ground that the overhead was improperly distributed between the work performed for the defendant and certain commercial work that was also carried on. The evidence shows that while the contract was being performed, the distribution of the factory overhead and the general and administrative expense was made jointly by the accounting representatives of both plaintiff and defendant, and in accordance with the definition of cost contained in the contract. Plaintiff submitted vouchers and received payment in accordance with the plan then agreed upon, and not until considerable time had elapsed after the completion of the contract did plaintiff set up a claim for additional compensation upon a different basis. At no time while the work was going on and payments being made was any question raised as to the method used in distributing overhead costs. On this point the mutual interpretation of the contract by the parties thereto is controlling. *Walker* v. *United States*, 143 Fed. 685; *Joice* v. *United States*, 51 C. Cls. 439, and cases cited therein. Moreover, the evidence fails to show that there is any definite rule for computing this overhead and we are inclined to think that the method used by the Government officials was correct.

PLAINTIFF'S CLAIM OF $57,523.50 FOR OVERHEAD ON REHABILITATION COST [ITEM (J)]

In its petition the plaintiff claimed $57,523.50 as overhead on rehabilitation labor cost after May 31, 1919, being the date when manufacturing work ceased on the contract. The War Department Claims Board allowed $17,194.72 for the same period, which has not been paid. Plaintiff now claims that the normal overhead upon both shipping and

restoration labor should be 129.00167 per cent, which would make the amount of its claim $55,823.41. The rate allowed by the board on shipping labor was 10 per cent, while on direct labor it allowed 167.64 per cent. There is no definite rule on this subject and the experts totally disagree. Under such circumstances any conclusion must be rather unsatisfactory, but we do not think that the shipping labor involved in removing the various machines and other property of the Government is the same as ordinary shipping labor, which is merely a repetition of certain acts day after day, and it does not seem to use to be at all reasonable that the kind of labor first specified should be allowed an overhead of only about one-seventeenth of that applied to direct labor. The evidence with reference to the amount assessed for months in which there were charges for shipping showed that the Government contract bore an overhead rate of about 90 per cent. This shipping was, however, irregular, and would not use so large a force. The best estimate we can make for overhead on this shipping labor in clearing out the factory is 60 per cent—a little more than one-third of the rate on the direct labor. Probably this is approximately correct, and computing it on this percentage we find that the plaintiff is entitled to $21,066.53. For this period the award of the Secretary of War allowed on productive labor an overhead of $5,274.17, and an overhead on removal facilities of $8,409.46. Adding this to the $21,066.53 allowed under this opinion for overhead on shipping labor, we have a total for overhead on labor after May 31, 1919, of $34,750.16.

PLAINTIFF'S CLAIM OF $11,437.38 FOR INTEREST ON THE COST OF INCREASED FACILITIES [ITEM (L)]

Further claim is made by plaintiff for interest on the cost of increased facilities in the sum of $11,437.38.

The "Definition of 'Costs,'" made a part of the contract by reference thereto, contained a provision that "the contracting officer will reimburse the contractor for interest paid by it on money borrowed to finance the purchase of materials necessary to complete contracts for the United

States." The plaintiff's contention is that machinery purchased to increase the manufacturing facilities of the plant would be included within the term "materials." The term "materials" must be held to have been used in its ordinary significance and meaning. As such, it would not cover machinery, jigs, fixtures, or tools, etc., used for the purpose of converting material into the finished product and constituting increased facilities. We conclude that the claim for interest on the cost of increased facilities must be rejected.

PLAINTIFF'S CLAIM OF $23,296.17 FOR OCCUPATION OF PLANT AFTER COMPLETION OF THE CONTRACT [ITEM (Q)]

Plaintiff claims $23,296.17 for the occupation of plaintiff's plant after the completion of the contract. This is an altogether different claim from the one which it made for delayed occupancy of the plant while the work was going on and stands on a different basis. In determining whether it should be allowed, it becomes necessary to consider the provisions of the contract and the state of the evidence.

The contract (Article X) required the contractor to store the Government property, the cost to be paid by the defendant, but not to exceed 10 per cent per annum of the cost of land and buildings used, or a proportion of such cost according to the proportion used. Article II of the fourth supplemental contract also provided that the defendant should have one year, "after the termination of the present emergency, as evidenced by proclamation of the President" within which to remove all increased facilities installed under the contract which were the property of the United States, and that until such removal, the defendant would pay therefor a reasonable dead storage as rental to the contractor.

Plaintiff presented a claim for $4,529.31 to the Boston claims board for storage rental. This claim was based on the provisions above recited, and the board approved the claim in full. The defendant admits that this much should be allowed on the claim. The plaintiff, however, claims that this sum is insufficient and that the claim is not in fact for storage but for occupation of the plaintiff's plant by the

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facilities owned by the Government and used in the contract work, which were not stored because, as it claims, the defendant failed to give any directions either for storage or for removal of the same.

The evidence is conflicting as to which party was at fault with reference to the disposition of the Government's property after the contract was completed. The defendant had the right to store it and did not. The storage removal would have cost the plaintiff a certain sum, but there is no evidence whatever as to what that sum would have been and there is no way that the court can determine whether anything would have been saved for the plaintiff if the defendant had directed it to be stored. Upon the whole, we think that the finding of the board, based on the provisions of the contract above recited, is as nearly accurate as can be determined from the evidence before us and the claim is accordingly allowed in the sum fixed by it.

PLAINTIFF'S CLAIM OF $3,860.02 FOR ACCOUNTANTS' COST OF PREPARING CLAIM [ITEM (R)]

No valid theory has been presented on which the claim for preparing the account against the Government can be allowed and we know of none. The claim must accordingly be rejected without considering whether the former Government officials who prepared it were acting contrary to law.

DEFENDANT'S COUNTERCLAIM OF $73,514.03 FOR INTEREST ON VALUE OF PROPERTY TRANSFERRED [DEFT'S ITEM (A) (1)]; PLAINTIFF'S CLAIMS OF $7,111.16 FOR INTEREST ON MATERIAL VOUCHERS PAID AFTER DELAY, AND $3,000.00 FOR INTEREST ON MATERIAL VOUCHERS NOT PAID [ITEMS (M) AND (N)]

Plaintiff's claim for interest on the cost of increased facilities has already been disallowed. As there was a mutual account between the parties, defendant's claim of $73,514.03 for interest on the value of property transferred to plaintiff will be disallowed, and also the other claims of plaintiff for interest on material vouchers paid after delay

($7,111.16), and interest on material vouchers not paid ($3,000.00).

In conclusion, there are some observations which should be made with reference to the claims of the respective parties. Plaintiff did not make a claim of $539,100 for profits which it would have earned on the contract but for defendant's delays until March 30, 1920. The only claim that it had made before which was at all in this line was for loss in earning power on car business in amount of $67,859.10, which claim was abandoned, doubtless by reason of a total lack of evidence to support it. The award of the Secretary of War made January 17, 1921, overruled the war claims board's finding that the plaintiff was liable for liquidated damages.

On November 12, 1918, after the expiration of the original contract, the fourth supplemental contract was executed reciting that the original contract remained in full force and effect, and on January 22, 1919, another supplemental contract was executed which again provided for the provisions of the original contract, except as amended thereby, to remain in full force and effect, and, in the meantime, the notice that only 600 carriages would be required had been served. It is apparent, therefore, that neither party originally considered that the other had breached the contract in the manner now claimed, and not until long after the work was completed did the plaintiff set up its present claim for damages, and the defendant conclude that the Secretary of War was wrong in not holding that the plaintiff was liable for liquidated damages. Each party apparently had considered the case as one in which there had been mutual delays, with many delays without the fault of either, and was willing to let the ultimate payment be determined by the provisions of the contract and the work done. But plaintiff refused to accept the award of the Secretary of War and from that time on the claims of the respective parties began to be expanded. Each apparently wanted to have something to set off against the claims that the other was making or was likely to make. It should be particularly observed that at no

time while the work was proceeding did plaintiff even suggest that the defendant was not complying with its part of the contract, and was making itself liable for damages. Instead it set up a claim for additional extensions which it kept increasing from time to time, not merely while the work was going on but largely after the work was completed, making change after change in its claims, all to increase the amount of delay which it claims was caused by the defendant. These mattters are not conclusive upon either party, but they strongly tend to sustain the conclusions which we have stated above with reference to the respective claims for damages.

Including the credits to which it is admitted plaintiff is entitled, the total amount allowed plaintiff in accordance with the foregoing opinion is $271,810.53, and defendant, including admitted credits, is allowed a total of $144,413.89. It follows that plaintiff is entitled to recover the difference, being the amount unpaid, of $127,396.64, and judgment will be entered accordingly.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

SUPPLEMENTAL OPINION

GREEN, *Judge*, delivered the opinion of the court:

Both plaintiff and defendant have filed motions for a new trial, the plaintiff, however, seeking only some changes in the findings to correct a stenographic error in one and to make some of the others more definite. Counsel for defendant do not object to the changes in the findings asked by plaintiff, but ask for an additional finding upon a matter which we deem entirely immaterial and insist that the ruling of the court denying interest to the defendant upon the agreed price of property sold to and left with the plaintiff after the completion of the contract ought to be reversed. The amount involved in this item of interest being large and the question of its allowance having been barely touched upon in either the former argument or the original opinion, it is thought best to explain more at

length the views of the court thereon, especially as the matter is now argued at length by counsel for defendant.

The rule with reference to interest in the cases which are brought in this court against the Government seems to have been misunderstood. It is quite true that, with certain exceptions not necessary to mention here, the plaintiff can not recover interest against the Government, when if it were bringing suit in some other court under similar circumstances against a private individual or corporation there would be no question about its allowance. But while the Government has this advantage in the Court of Claims, it is a mistake to suppose that it can or should be allowed interest on its claims or set-offs against the plaintiff under circumstances which would not justify a court in making such an allowance under the general rules with reference to interest. In other words, the Government is not allowed interest simply because it is the sovereign power that is setting up its claim, but because under the principles of law relating to interest it is entitled to such an allowance in the same manner that a private individual would be under similar circumstances.

Keeping this principle in mind, it will be seen that the cases cited by counsel for defendant in their brief in support of the defendant's motion for a new trial have no application. In none of the cases cited was there any question as to whether the Government should be allowed interest. In all of them the question was whether the plaintiff or claimant against the Government could be allowed interest. The question in the case at bar is whether the United States, as defendant, can be allowed interest on the item above mentioned.

A brief reference to the cases cited and relied upon will show that they do not support the position taken by the defendant. In the case of *United States* v. *Verdier*, 164 U. S. 213, it appeared that the Government had obtained a judgment against the plaintiff and as a matter of course was entitled to interest thereon; but so far as the debt of the Government to Verdier is concerned, it was held for several reasons that interest could not be allowed thereon and that

the fact that the Government was entitled to interest on its judgment did not alter the situation. In the case of *United States* v. *North American Co.*, 253 U. S. 330, the North American Company sought to recover not only the value of certain property taken over by the Government but interest thereon from the time when it was taken, and it was held (under the law as it then stood) that no interest could be allowed. The court did, indeed, say that "in the adjustment of mutual claims between an individual and the Government, the latter has been held entitled to interest on its credits although relieved from the payment of interest on the charges against it," but this statement clearly has no application to a case where under the general rules with reference to interest the Government was not entitled to have it allowed. It also should be noted that in the *Verdier case*, *supra*, which was cited in this connection, there were mutual claims but there was no mutual account. Instead there was a judgment upon one side and a claim for salary on the other. *Boston Sand Co.* v. *United States*, 278 U. S. 41, is simply another case where the only question was whether the plaintiff could be allowed interest on or as a part of damages awarded in an admiralty case. The majority opinion in the case held that such interest could not be allowed and also, as is shown by the part of the opinion quoted by counsel, held that the fact that the United States might be allowed interest in a similar case was not controlling, and that the right of the plaintiff therein to interest was dependent upon the statute under which the suit was brought, which, as the majority opinion construed it, did not authorize the allowance of interest.

Under well-settled rules of law the defendant was not entitled to interest upon the item under consideration: First, because it was merely one out of a large number of items of an unsettled open mutual account between the parties; second, because, although the evidence shows that the price of the property was agreed upon, it fails to show any agreement as to when it was to be paid, but, on the contrary, taking all of the circumstances together it may be inferred that there was no expectation that payment should be made until there was a settlement of the whole matter in contro-

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versy beween the parties; third, because there is no evidence of any demand for the payment of the agreed price which would fix the time from which interest might run.

In 33 C. J. 233, section 123, it is said:

"But it is very generally held that in the absence of a special agreement as to interest, or as to the time the debt is to be paid, interest should be allowed on such debt only from the time the principal is demanded."

The cases cited by counsel to show that the Government is entitled to interest are not in point. The one that seems to be especially relied upon—*United States* v. *United States Fidelity & Guaranty Co.*, 236 U. S. 512—tends to refute the position of defendant rather than sustain it, for the Government therein was not permitted to recover interest on the debt for the entire period during which the money sued for was withheld, but only from the time when the obligation became fixed by reason of circumstances arising rendering it unnecessary for the Government to make a demand.

We conclude that the motion of defendant must be overruled and the motion of plaintiff sustained in so far as to make the changes in the findings asked in its motion, to which reference has heretofore been made. Neither party to the action claims that these changes will have any effect upon the judgment rendered.

An order will be entered in accordance with this opinion.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

NEW YORK & BALTIMORE TRANSPORTATION LINE v. THE UNITED STATES

[No. C-927. Decided May 6, 1929]

On the Proofs

Eminent domain; bill of sale; delivery; acceptance of price.—Where plaintiff voluntarily withdrew its expression of dissatisfaction at an award of compensation fixed by the President under the act of June 15, 1917, for the acquirement of its vessels, executed bills of sale therefor, delivered the vessels to the Gov-

ernment and accepted the price fixed, the vessels were acquired by purchase and not by a taking, and plaintiff can not recover as for a taking.

The Reporter's statement of the case:

Mr. Challen B. Ellis for the plaintiff. *Messrs. Hoke Smith, Wade H. Ellis*, and *F. M. Bird* were on the brief.

Mr. George Dyson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The New York & Baltimore Transportation Line, plaintiff herein, is now, and was during all of the times hereinafter mentioned, a corporation organized and existing under the laws of the State of Maryland, with an office for the transaction of business in the city of New York, State of New York, and was at the times hereinafter mentioned, and for many years prior thereto, engaged in the operation of a coastwise freight service between the city of New York and the city of Baltimore.

II. On August 26, 1918, and for some time prior thereto, plaintiff was the owner of three vessels, namely, the *Chesapeake, Manna Hatta*, and the *Baltimorean*, together with their equipment, consisting of engines, boilers, tackle, apparel, furniture, and furnishings. The *Chesapeake* and *Manna Hatta* each had a tonnage of 1,250 deadweight tons, and the *Baltimorean* had a tonnage of approximately 800 deadweight tons. These three vessels were the only steamships operated by plaintiff in its coastwise service from New York to Baltimore.

III. Under date of August 26, 1918, the Secretary of the Navy wrote plaintiff as follows:

"The President has directed me to inform you that by virtue of the power and authority vested in him by the act entitled 'An act making appropriations for the Military and Naval Establishments, etc.,' approved June 15, 1917, your vessels *Chesapeake* and *Manna Hatta* will be acquired by the Navy by purchase.

"The vessels have been inspected and an appraisal will be made by a board of appraisal to determine the just compensation.

"You are authorized to appear before or communicate with this board and to present to it, orally or in writing, all the evidence you desire taken into consideration in determining the amount of such compensation. This evidence must be presented at such time as the board of appraisal may set. The address of the board of appraisal is 280 Broadway, New York.

"Your attention is invited to the provisions of the act before mentioned regarding compensation. A copy of that portion of the act relating thereto is inclosed.

"You will be informed of the amount determined to be a just compensation for your vessels."

Pursuant to the authorization contained in said letter plaintiff appeared before the board of appraisal and submitted evidence as to the value of its vessels.

Under date of October 31, 1918, the Acting Secretary of the Navy wrote plaintiff as follows:

"You are informed that the President has determined a just compensation for the acquisition of the steamships *Chesapeake* and *Manna Hatta* to be one hundred and seventy-five thousand dollars ($175,000).

"The commandant of the third naval district has been ordered to pay you, upon proof of ownership, should the condition of said vessels be the same as when inspected, the sum of one hundred and seventy-five thousand ($175,000) dollars for each vessel.

"The commandant has also been authorized to pay to you a further sum equal to the value of ordinary consumable stores on board at time of delivery."

IV. On November 8, 1918, the plaintiff requested the Secretary of the Navy to have a reappraisal made of the *Chesapeake* and *Manna Hatta*. Under date of November 15, 1918, the Secretary of the Navy replied to said letter, stating, among other things, "It has been the uniform policy of the Secretary of the Navy heretofore in cases of this kind not to order a reappraisal." Thereupon the president of the plaintiff corporation sent the following letter, dated November 18, 1918, to the commandant, third naval district:

"This company has been advised by the Secretary of the Navy that the President has determined the just compensa-

tion for the acquisition of the steamships *Chesapeake* and *Manna Hatta* to be $175,000 for each vessel, and that you have been ordered to make this payment to the undersigned company.

"We have to advise you that the amount so determined is unsatisfactory to this company, and we now make application for the payment to us of the percentage of the amount so determined as is provided by the act under which these vessels were acquired by or for the Government. Will you be good enough to advise us when and where this percentage will be payable to the company, in order that we may prosecute our rights by action as provided in the statute?"

Under date of November 30, 1918, the office of the commandant of the third naval district sent to the plaintiff the following letter:

"Your letter of November 18th to the commandant received, advising that the purchase price as determined by the board of appraisal for the steamships *Chesapeake* and *Manna Hatta*, viz, $175,000 each, is unsatisfactory to you, and that you desire to accept 75% of this amount and prosecute a claim for such additional sum as you may be advised.

"This being the case it is essential before the payment of this 75%, that the commandant be furnished an original and duplicate deed of transfer to the United States in the case of each of these vessels. When these are received and made a matter of record, order for requisition for payment to you of 75% will be issued and paid through the usual channels. Following out the usual practice, you can at that time give the commandant a receipt for the 75% in each case."

Thereafter, the office of the commandant prepared and forwarded to Joseph Diehl Fachenthal, of the firm of Barber, Watson & Gibboney, attorneys for the plaintiff, two proposed receipts dated December 7, 1918, each in the sum of $131,250, which sum was 75% of $175,000 determined as just compensation to the owners by the President, under the provisions of the act of June 15, 1917, for the *Chesapeake* and *Manna Hatta*, for the purpose of having the plaintiff sign the same, and also two proposed bills of sale dated December 7, 1918, to be executed by the plaintiff, transferring the title to each of said vessels to the United States. It was recited in each of the proposed bills of sale—

"Whereas New York & Baltimore Transportation Line, the owner of said vessels, is dissatisfied with the value placed

thereon by the President as provided for in the said act and has refused and does refuse to accept the same as fair and just compensation for the said vessels; * * *, but reserving to itself all claims for compensation allowed to it by the said act and all rights and remedies for the determination, collection, suit for, and recovery of the said compensation for and value of the said vessels.

"Now, we, the said New York & Baltimore Transportation Line, reserving to itself all of said rights and remedies, does hereby confirm unto the United States the title to the whole of said steamship or vessel, ———, it being the intent of this instrument to make absolute in the United States the title to the said vessel with full reservation to the said New York & Baltimore Transportation Line of all rights and remedies for compensation for the seizure of said vessel by the United States; and ——— excepting only the claim, suit and cause of action for the value of said vessel and for compensation therefor of itself, its successors or assigns."

The said proposed receipts and two bills of sale were not signed and executed by the plaintiff but were returned to the office of the commandant of the third naval district along with the following letter:

BARBER, WATSON & GIBBONEY,
165 Broadway, New York, January 11, 1919.

Lieut. A. E. ACKERMAN,
Office of the Commandant, Third Naval District,
280 Broadway, New York City.

DEAR SIR: As requested by you, I am returning herewith the papers prepared by you and sent to me for the transfer of the boats *Manna Hatta* and *Chesapeake* upon the payment of 75% of the award upon the condemnation.

I am sorry you were put to the trouble of preparing these papers when the company adopted a different course of procedure.

Very truly yours,
JOSEPH DIEHL FACHENTHAL.

Under date of December 10, 1918, the following proceedings were had by the board of directors of plaintiff corporation:

"Minutes of a special meeting of the board of directors of the New York & Baltimore Transportation Line held at 61 Broadway, at 3.00 p. m., this day (December 10, 1918).

"Present: Mr. John Monks, jr., Mr. H. K. Knapp, Mr. C. C. Crook, and Mr. B. R. Roome.

"The president presided.

Reporter's Statement of the Case

"The president stated that the object of the meeting was to give reconsideration to the decision heretofore made by the board not to accept the award of the appraisal board for the *Chesapeake* and *Manna Hatta*, but to take 75% of the award and proceed in the Court of Claims for the balance of the price of the vessels which the board believed them to be worth. He stated that in his opinion, and after consulting with other stockholders, it is advisable to accept the award of the appraisal board and then to proceed in the Court of Claims against the Government for consequential damages caused by the necessary discontinuance of the line. After discussion on motion of Mr. Knapp, seconded by Mr. Crook, the following resolution was adopted unanimously:

"*Resolved*, That John Monks, president, and B. R. Roome, secretary and treasurer of this company, or either of them, be, and they hereby are, authorized and directed to execute and deliver to the commandant of the third naval district bills of sale to the United States of the steamers *Chesapeake* and *Manna Hatta* for $175,000 each; also to execute and deliver in the name of the company any and all other papers that may be necessary to transfer these vessels to the United States, and receive payment for same. * * *"

On the same date plaintiff wrote the commandant of the third naval district as follows:

"Referring to our letter of November 18, in which we advised you that the award of the appraisal board of $175,-000 for each of these vessels was unsatisfactory, and that we desired to be paid the percentage of the amount determined and proceed under the act under which the vessels were acquired by or for the Government. This is to advise you that at a meeting of the board of directors of this company held this day it has been decided to accept the award of the Government in this matter and not to proceed as originally intended, and as we advised you we would in our letter above referred to. We are now preparing bills of sale covering each vessel for presentation to you and will be obliged if you will advise us if any other action on our part in connection with securing the award is required by you, * * *"

On or about December 11, 1918, the plaintiff executed and delivered to the defendant a bill of sale of the *Chesapeake*, the relevant portion of which reads as follows:

"The New York and Baltimore Transportation Line, owners of the steamship or vessel called the '*Chesapeake*,' of the burden of 1,101 and 00/100 tons or thereabouts, for and in consideration of the sum of one hundred and seventy-five

thousand and 00/100 ($175,000) dollars lawful money of the United States of America, to it in hand paid, before the sealing and delivery of these presents, by the United States of America, the receipt whereof we do hereby acknowledge and are therewith fully satisfied, contented, and paid, have bargained and sold, and by these presents do bargain and sell, unto the said the United States of America, its successors and assigns, all of the said steamship or vessel, together with all the masts, bowsprit, sails, boats, anchors, cables, tackle, furniture, and all other necessaries thereunto appertaining and belonging; the consolidated certificate of enrollment and license of which said steamship or vessel is as follows, viz:

[Here is inserted the said certificate and license.]

"To have and to hold the said steamship *Chesapeake* and appurtenances thereunto belonging, unto the said the United States of America, its successors and assigns, to the sole and only proper use, benefit, and behoof of the said the United States of America, its successors and assigns, forever: And we the said New York and Baltimore Transportation Line have, and by the presents do promise, covenant, and agree, for ourselves, our successors, and assigns, to and with the said the United States of America, its successors and assigns, to warrant and defend the steamship *Chesapeake* and all the other before-mentioned appurtenances against all and every person and persons whomsoever."

And on or about the same date executed and delivered to the defendant a bill of sale of the *Manna Hatta*, identical with the foregoing except as to name of vessel and tonnage, which was shown as 1,103 tons.

Under date of January 13, 1919, the commandant of the third naval district delivered to plaintiff checks in the total amount of $352,481.39, the same representing the amount of the award, $175,000 for each of the vessels, and an additional sum of $2,481.39 for consumable stores on board the vessels at the time they were taken over by the United States.

Under date of April 8, 1920, plaintiff, by its attorney, sent the Secretary of the Navy the following letter:

Hon. Josephus Daniels,
Secretary of the Navy, Washington, D. C.

My Dear Mr. Secretary: Please permit me to hand you herewith a brief memorandum of facts relating to the commandeering by the Navy Department of the steamships

Chesapeake and *Manna Hatta*, then owned by the New York & Baltimore Transportation Line, a Maryland corporation.

May I invite your special consideration of the fact that these ships had been sold for more than $300,000 each to a Manila, P. I., corporation; that the approval of the sale was withheld by the Shipping Board only at the insistence of the Director General of Railroads because of the then severe traffic congestion; that this objection was subsequently withdrawn, and the sale about to be approved, when, in August, 1918, the ships were taken over by the Navy under an award of only $175,000 for each vessel; and that, after fourteen months' use of the ships, they were sold by the Government at auction in England, in November, 1919, for 160,000 pounds, which, at the then current rate of exchange was the equivalent of $667,200, or more than twice the amount that had been awarded and paid the former owner.

We feel assured that the Government does not wish to profit at the expense of its citizens, and we therefore present this matter to you in the hope that its moral justice is such as will commend itself to you, and dispose you to aid us in securing just compensation for the loss of our property to the extent that you may become satisfied that such compensation has not been accorded.

Respectfully,

New York & Baltimore Transportation Line,
By William A. Wimbish, *Attorney*.

V. During the time that plaintiff conducted its coastwise transportation line between New York and Baltimore it owned and operated in addition to the *Chesapeake* and the *Manna Hatta* a smaller vessel, the *Baltimorean*. Plaintiff also owned, maintained, and used in its business certain tugs and lighters, together with the lease of a wharf on Pier 10, East River, New York City, and terminals in Baltimore, Maryland.

The *Baltimorean* was not taken by the Navy Department, but after the two larger vessels were so taken plaintiff could not conduct its business with the one smaller vessel. Plaintiff sold the *Baltimorean* for the sum of $71,000, or about $85.00 per deadweight ton. At the time the vessel was sold there was no market for a small vessel of that kind. During the time that plaintiff operated the *Baltimorean*, and at the time the two larger vessels were taken over by the United States, the value of the *Baltimorean* was $175.00 per deadweight ton.

By the discontinuance of its coastwise business plaintiff suffered a loss on its pier at New York City and on its Baltimore terminals, but it does not appear from the evidence in the case what disposition, if any, was made of these properties and what loss plaintiff sustained on its New York pier and its Baltimore terminals.

VI. Under date of February 26, 1918, plaintiff entered into a written contract of sale with the Compania Maritima, of Manila, Philippine Islands, for the three vessels, namely, the *Chesapeake*, *Manna Hatta*, and *Baltimorean*, at and for the price of $250.00 per deadweight ton for each vessel, payable in cash, after satisfactory inspection. The *Chesapeake* and *Manna Hatta* were inspected by the buyer and found satisfactory, and the purchase price of all three vessels, in accordance with the terms of the contract, was placed on deposit at the Philippine National Bank, New York, for payment to plaintiff in the event permission could be obtained from the United States Shipping Board to transfer the vessels to the purchaser. The *Baltimorean* was not inspected. Application was made to the Shipping Board for authority to sell and transfer said vessels, which application was denied. The money representing the purchase price remained on deposit in the bank until the *Chesapeake* and *Manna Hatta* were taken over by the Navy Department.

VII. On August 26, 1918, the fair market value of the *Manna Hatta* and the *Chesapeake* was the sum of $250.00 per deadweight ton for each of the said vessels. Plaintiff has received from the Government the full amount of the award determined as just compensation for said vessels, the same being the total sum of $350,000.

VIII. During the time that the Government had possession of said vessels it changed them from peace-time commercial ships to war-time vessels by making alterations and adding equipment thereto. The total expense of making said changes and alterations by the Government was $328,430.65 for the *Chesapeake* and $330,538.18 for the *Manna Hatta*. Under date of October 15, 1919, the Government of the United States, by order of the Secretary of

the Navy, sold the vessel *Chesapeake* at public sale for the sum of $430,540.00. On the same day and date the vessel *Manna Hatta* was sold at public sale for the sum of $238,-260.00. By the terms of the sale all ordnance equipment and listing devices that were installed on the vessels by the United States were reserved and remained the property of the United States.

The changing of the vessels from peace-time commercial vessels to war-time vessels by adding ordnance equipment did not add anything to the value of said vessels for commercial purposes.

IX. Plaintiff is indebted to the United States in the sum of $275.25, and also in the sum of $274.02, as alleged in paragraphs 2 and 3, respectively, of defendant's counterclaim, the same representing losses on goods and merchandise that were shipped over plaintiff's transportation line and connecting railroad lines during the time that the railroads were under Government control. Both of these sums were paid by the Government and claims were made against the plaintiff corporation for said amounts. Plaintiff corporation acknowledged said claims to be just, but has never paid the same or any part of them.

Paragraphs 1, 4, 5, 6, and 7 of defendant's counterclaim have not been proven.

The court decided that plaintiff was not entitled to recover. Defendant entitled to recover $549.27.

GRAHAM, *Judge*, delivered the opinion of the court:

On July 28, 1923, the plaintiff filed its original petition in this case claiming a sum of money, with interest, as just compensation for the commandeering of two of its steamships, the *Chesapeake* and *Manna Hatta*. It filed an amended petition on April 28, 1925, setting up a further claim for consequential damages to its business by the taking of the two said ships and also for loss on the sale of a companion ship known as the *Baltimorean*.

The plaintiff claims that the United States requisitioned or commandeered the two said ships, secured possession of them, and held possession of them by this means. The de-

fendant claims that, while the original proceedings were requisition proceedings, the President fixed a sum as just compensation which the plaintiff accepted, and in pursuance of such acceptance executed to the defendant formal bills of sale for each of the vessels, and that the Government thus secured said vessels by contract for a given price, which price it has paid. It is plain that if the contention of the Government is valid, the claim set up in the amended petition for consequential damages falls to the ground.

The requisition order dated August 26, 1918, was from the Secretary of the Navy and stated that the President had directed him by virtue of the power and authority vested in him by the act approved June 15, 1917, to acquire the vessels *Chesapeake* and *Manna Hatta* for the Navy by purchase, and authorizing the plaintiff to appear before the board appointed for the purpose and present any evidence it might desire for consideration in determining the amount of compensation, giving the address of the board. Thereafter the plaintiff appeared and presented evidence of the value of the vessels. On October 31, 1918, the Acting Secretary of the Navy informed the plaintiff that the President had determined as just compensation for the acquisition of the two vessels the sum of $175,000 each, and stated:

"The commandant of the third naval district has been ordered to pay you, upon proof of ownership, should the condition of said vessels be the same as when inspected, the sum of one hundred and seventy-five thousand ($175,000) dollars for each vessel. * * * also * * * to pay to you * * * the value of ordinary consumable stores on board at time of delivery."

On November 18, 1918, the plaintiff notified the Secretary that the price fixed as compensation was not satisfactory to it, and that it desired to accept 75% of the amount and pursue its claim for such additional sums as would amount to just compensation. The Navy Department on November 30, 1918, replied to this letter, mentioning the statement therein that the price fixed was unsatisfactory, and stated that this being the case it was essential before the payment of the 75% that the department should be furnished an original and duplicate deed of transfer to the United States

in the case of each of said vessels, and that when these deeds were received an order would be issued for the payment of 75%.

Thereafter, on December 10, 1918, the plaintiff's board of directors met and the president stated that the object of the meeting was to give reconsideration to the decision heretofore made by the board not to accept the award of the appraisal board for the *Chesapeake* and *Manna Hatta*, but to take 75% of the award and proceed in the Court of Claims for the balance of the price which the board believed the vessels to be worth, and that in his opinion, after consulting with other stockholders, it was advisable to accept the award of the appraisal board and proceed in the Court of Claims "for consequential damages caused by the necessary discontinuance of the line," and after discussion the following resolution was adopted:

"*Resolved*, That John Monks, president, and B. R. Roome, secretary and treasurer, of this company, or either of them, be, and they hereby are, authorized and directed to execute and deliver to the commandant of the third naval district bills of sale to the United States of the steamers *Chesapeake* and *Manna Hatta* for $175,000 each; also to execute and deliver in the name of the company any and all other papers that may be necessary to transfer these vessels to the United States, and receive payment for same. * * *"

On the same day the plaintiff addressed a letter to the representative of the department, which was as follows:

"Referring to our letter of November 18, in which we advised you that the award of the appraisal board of $175,000 for each of these vessels was unsatisfactory, and that we desired to be paid the percentage of the amount determined and proceed under the act under which the vessels were acquired by or for the Government. This is to advise you that at a meeting of the board of directors of this company held this day it has been decided to accept the award of the Government in this matter and not to proceed as originally intended, and as we advised you we would in our letter above referred to. We are now preparing bills of sale covering each vessel for presentation to you, and will be obliged if you will advise us if any other action on our part in connection with securing the award is required by you, * * *."

Opinion of the Court

On or about December 11, 1918, the plaintiff executed and delivered to the defendant bills of sale of the two vessels and on January 13, 1919, received the defendant's checks for $352,481.39, being 100% of the award, or the sum fixed by the President and offered as compensation for the vessels, and an additional sum of $2,481.39 for consumable stores on board. So far as the findings show, nothing further was done, no protest was entered at the time of the acceptance of the checks, nor was anything further heard of the matter until April 8, 1920, when the plaintiff addressed a letter to the Secretary of the Navy claiming that the value of the ships was nearly twice the amount that had been awarded, and expressing the hope that a statement of the facts would dispose the Secretary to aid it in securing just compensation for the loss of the property.

Thereafter nothing was done in the matter until suit was brought in this court, as stated, on July 28, 1923.

It will thus be seen that the plaintiff after expressing dissatisfaction with the compensation offered decided at the meeting of its board of directors on December 10, 1918, on the advice of its president, to withdraw from that position and to accept the 100% of the amount offered and proceed in the Court of Claims " for consequential damages caused by the necessary discontinuance of the line " which, of course, would not involve the value of the two ships. The resolution heretofore quoted authorized its officers to execute and deliver bills of sale to the United States and any other papers that might be necessary " to transfer these vessels to the United States, and receive payment for same." On the same day plaintiff wrote to the representative of the Government referring to its letter of November 18, 1918, in which it said that the price was unsatisfactory, and that it desired to be paid the full amount determined, that at a meeting of the board of directors held that day it had been " decided to accept the award of the Government in this matter, and not to proceed as originally intended, and as we advised you we would in our letter referred to "—that is, November 18, 1918—and that " we are now preparing bills of sale covering each vessel for presentation to you," and ask-

ing if any other action on its part in connection with securing the award was required by the Government. Thereafter, after executing the bills of sale, plaintiff on January 13, 1919, was paid the full amount of compensation fixed by the President, without protest or reservation.

Thus it is clear that, after expressing dissatisfaction, it withdrew that expression and decided to accept the amount offered, stating that it had changed its mind and offering to prepare the necessary bills of sale for the transfer of the vessels, and thereafter prepared the bills of sale, delivered them, and received the amount agreed upon. This court has repeatedly held that a transaction of this kind, where there has been an offer, a voluntary acceptance of the offer, and a receipt of the money and delivery of the goods, is a contract. This case is noticeably strong, for the reason that after expressing dissatisfaction with the amount offered and a purpose to take 75% and sue for the balance, it voluntarily withdrew the objection, notified the Government to this effect, stating that it had concluded to accept the amount offered, expressing a willingness to execute the necessary bills of sale and do such other acts as would enable it to secure payment of the amount fixed, and thereafter executed the bills of sale and received the sum agreed upon.

It might be said in passing that this case is easily distinguished from the case of *Thompson et al.* v. *United States*, 62 C. Cls. 516, relied upon by the plaintiff, which was based upon the fact that plaintiff had expressed dissatisfaction with the award and had not withdrawn it before receiving the amount of the award, and did not withdraw it at the time nor give any receipt in full. Numerous cases have been decided by the Supreme Court, this court, and other Federal courts upholding the position that the facts recited, show a contract. *American Smelting & Refining Co. case*, 259 U. S. 75; *Pacific Mail Steamship Co.* v. *United States*, 59 C. Cls. 246, 248; *Consolidation Coal Co.* v. *United States*, 60 C. Cls. 608, 270 U. S. 664; *Pocahontas Fuel Co.* v. *United States*, 61 C. Cls. 231; *Alcock & Co.* v. *United States*, 61 C. Cls. 312, 325; *Penn Chemical Co.* v.

United States, 63 C. Cls. 15, 26; *New River Collieries Co. et al.* v. *United States*, 65 C. Cls. 205 (certiorari denied October 15, 1928); *William C. Atwater & Co., Inc.* v. *United States*, 65 C. Cls. 621 (certiorari denied October 15, 1928), and *White Oak Coal Co.* v. *United States*, 15 Fed. (2d) 474.

In this view of the matter there can be no recovery on the plaintiff's claim for the consequential damages to its business, and for its loss on the sale of the third ship, the *Baltimorean*, inasmuch as the transfer of these vessels was its voluntary act under a contract, and any damage it suffered was due to its own act and not any act of the Government. However, if it were otherwise, under the decision in the case of *Mitchell* v. *United States*, 267 U. S. 341, 344, it would seem that the plaintiff could not recover for these consequential damages.

The facts found show that neither the business nor the ship *Baltimorean* was taken, nor was there any intention to take them. See *Tempel* v. *United States*, 248 U. S. 121. The plaintiff is not entitled to recover on the claims set up in either the original or amended petition.

It appears that plaintiff is indebted to the United States in the sums of $275.25 and $274.02, and for these sums defendant is entitled to recover judgment, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

DICK & BROS. QUINCY BREWING CO. v. THE UNITED STATES

[No. F-146. Decided May 6, 1929]

On the Proofs

Income tax; deductions; brewing company; advent of prohibition; loss of good will.—Where before the advent of prohibition a brewer has acquired and maintained a valuable good will, and thereafter manufactures near beer at a loss for several successive years, the diminution in value of the good will result-

ing from prohibition is not such a loss as may be deducted in a corporation income-tax return under section 234 (a) (4) of the revenue act of 1918.

The Reporter's statement of the case:

Mr. Monte Appel for the plaintiff. *Messrs. Ralph W. Jackman* and *C. A. Heisterman* were on the brief.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is and at all times hereinafter mentioned was a corporation duly organized and existing under the laws of the State of Illinois, with its office and plant in the city of Quincy, State of Illinois, where from 1883 to 1919 it was continuously engaged in the business of manufacturing and selling beer.

II. Plaintiff filed its return of Federal income and excess-profits taxes for its taxable year 1919 on January 23, 1920, and paid such taxes on or about January 26, 1920, in accord with said return, and the defendant still retains $2,293.46 so paid by plaintiff as income and excess-profits taxes for its taxable year 1919.

III. During the seven years, 1906 to 1912, inclusive, 10 per cent was a fair and reasonable return of income upon the value of physical assets owned by plaintiff and used by it in its business of manufacturing and selling beer, and during the seven years, 1906 to 1912, inclusive, all income of plaintiff in excess of a return of 10 per cent upon its physical assets was income upon its good will; during the seven years, 1906 to 1912, inclusive, the average yearly value of plaintiff's physical assets owned by it and used by it in its business of manufacturing and selling beer was $1,213,397.40, and an average yearly return of 10 per cent upon the value of such physical assets was $121,339.74; during the seven years, 1906 to 1912, inclusive, plaintiff's average yearly net income from its business of manufacturing and selling beer was $145,327.76, and during the seven years, 1906 to 1912, inclusive, plaintiff's average yearly net

income in excess of its said average yearly return of 10 per cent upon the value of its said physical assets was $23,988.02; the value of plaintiff's good will on March 1, 1913, is represented by a capitalization on the basis of five times the excess of plaintiff's average yearly net income during the seven years, 1906 to 1912, inclusive, over and above an average return to plaintiff of 10 per cent upon the average yearly value of its said physical assets during the seven years, 1906 to 1912, inclusive; the capitalized value on March 1, 1913, of plaintiff's earnings upon its good will during the seven years, 1906 to 1912, inclusive, was $119,940.10; the value of plaintiff's good will on March 1, 1913, was $119,940.10.

IV. During the period from March 1, 1913, to June 30, 1919, upon which latter date prohibition became effective in the State of Illinois, plaintiff continued in the business of manufacturing and selling beer.

V. On and after July 1, 1919, plaintiff was prohibited by legislation from further engaging in its business of manufacturing and selling beer, and on July 1, 1919, plaintiff discontinued its business of manufacturing and selling beer and engaged in the business of manufacturing and selling cereal beverage with an alcoholic content of less than one-half (½) of 1 per cent, commonly known as near beer, and continued in the business of manufacturing and selling near beer from July 1, 1919, until the year 1925, using in such manufacture and sale of near beer the same physical assets as it had previously used in the manufacture and sale of beer.

VI. During such period from July 1, 1919, until the year 1925, in which it so engaged in the manufacture and sale of near beer, plaintiff made no net income, and in the following years suffered operating losses in the following amounts: $69,394.07 in 1920; $111,652.12 in 1921; $94,914.99 in 1922; $27,922.72 in 1923; $36,722.17 in 1924; $34,003.94 in 1925. In the year 1925 plaintiff ceased the manufacture and sale of near beer and liquidated its assets and liabilities and terminated business operations.

VII. No deduction from gross income has been allowed and no credit or refund of Federal income or excess-profits

taxes has been made by the Commissioner of Internal Revenue or the United States on account of the loss which is claimed by the plaintiff to be deductible in this case.

Within the statutory period of limitations plaintiff filed a claim for refund of all of its income and excess-profits taxes paid for its taxable year 1919, February 26, 1923, which claim the Commissioner of Internal Revenue duly rejected in the amount in this suit April 19, 1924, and the above-entitled suit to recover said taxes was started by plaintiff within two years from the date of such rejection.

VIII. If plaintiff sustained a loss during its taxable year 1919, such loss was not compensated for by insurance or otherwise.

IX. If plaintiff is entitled as a matter of law to take a deduction from gross income for its taxable year 1919 in an amount equal to or in excess of $24,558.57, its income and excess-profits taxes in the amount of $2,293.46, paid by it for its taxable year 1919 are refundable to it in their entirety with interest thereon at the rate of six per cent per annum from January 29, 1920, until judgment.

The court decided that plaintiff was not entitled to recover.

SINNOTT, *Judge*, delivered the opinion of the court:

Plaintiff from the year 1883 to June 30, 1919, when prohibition became effective, was engaged in the business of manufacturing and selling beer. The value of plaintiff's good will on March 1, 1913, was $119,940.10. (Finding III.)

On July 1, 1919, on the advent of prohibition, plaintiff discontinued its business of manufacturing and selling beer and engaged in the business of manufacturing and selling what is commonly known as near beer, and continued in such business until the year 1925, using in such manufacture and sale of near beer the same physical assets as it had previously used in the manufacture and sale of beer. While plaintiff was engaged in the manufacture and sale of near beer from July 1, 1919, until the year 1925, it operated each year at a loss. In the year 1925 plaintiff ceased the manu-

facture and sale of near beer and liquidated its assets and liabilities, and terminated business operations.

In the year 1920 plaintiff paid income and excess-profits taxes for the year 1919 in the sum of $2,293.46, which is the amount involved in this case. It is plaintiff's contention that its good will, which on March 1, 1913, had a value of $119,940.10, became entirely worthless during the taxable year 1919 on account of prohibition, and that during that year it thereby sustained a loss in that amount, and is entitled to deduct such loss from its gross income for its taxable year 1919, and to have refunded $2,293.46 taxes paid for 1919, pursuant to the terms of subsection (4) of section 234 (a), of the revenue act of 1918, 40 Stat. 1057, the pertinent parts of which read as follows:

"SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions: * * *

"(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise."

We have denied plaintiff's request for two additional findings of fact, which it claims necessarily flow, as conclusions of ultimate fact, from the stipulated Finding VI.

The rejected findings are as follows:

"1. During the year 1919, by reason of the passage of prohibition legislation, plaintiff's good will was made worthless and of no value.

"2. During the year 1919 plaintiff sustained a loss in the amount of $119,940.10."

We are confronted with the question: Did plaintiff's good will become worthless during the year 1919 because it was deprived by prohibition of the right to manufacture and sell beer, although it continued, as a going concern until 1925, to manufacture and sell near beer under the old firm name and at the same place of business? In other words, did plaintiff's good will consist solely of its right to manufacture and sell beer?

Good will has been variously defined by the courts. A favorite definition, repeated in many decisions, is the probability that old customers will resort to the old place. It has been referred to as an asset, separate and distinct from

its stock of goods, or capital, consisting of the advantage inuring to the firm because of general public patronage; as a favor which the management of a business wins from the public; every advantage which the firm may have acquired with the name of the firm or business, its location or reputation.

The Supreme Court in *Menendez* v. *Holt*, 128 U. S. 521, says with reference to good will:

"Good will was defined by Lord Eldon, in *Cruttwell* v. *Lye*, 17 Ves. 335,346, to be 'nothing more than the probability that the old customers will resort to the old place'; but Vice Chancellor Wood, in *Churton* v. *Douglas*, Johnson V. C. 174,188, says it would be taking too narrow a view of what is there laid down by Lord Eldon, to confine it to that, but that it must mean every positive advantage that has been acquired by the old firm in the progress of its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business."

The Supreme Court in *Metropolitan Bank* v. *St. Louis Dispatch Co.*, 149 U. S. 446, defines good will as follows:

"Undoubtedly, good will is in many cases a valuable thing, although there is difficulty in deciding accurately what is included under the term. It is tangible only as an incident, as connected with a going concern or business having locality or name, and is not susceptible of being disposed of independently. Mr. Justice Story defined good will to be 'the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessity, or even from ancient partialities or prejudices.' Story Part. Sec. 99."

It is apparent from the various definitions of good will, and particularly from the two citations, *supra*, from the Supreme Court, that many attributes other than the goods sold enter into the definitions and composition of good will. It must be obvious, therefore, that while plaintiff continued as a going concern at its old place of business and under its

old firm name, with many other advantages acquired in the progress of its business, as suggested in *Menendez* v. *Holt* and *Metropolitan Bank* v. *St. Louis Dispatch Co., supra*, that its good will, built up during many years, in part at least still adhered to the firm until it ceased operations in 1925.

It is doubtless true that this good will was diminished in value on account of the change from beer to near beer, but we are only concerned with the question whether plaintiff's good will became worthless in 1919, for in the case of *United States* v. *S. S. White Dental Manufacturing Co.*, 274 U. S. 398, cited by plaintiff, commenting upon the statute in question, the Supreme Court said:

"The statute obviously does not contemplate and the regulations forbid the deduction of losses resulting from the mere fluctuation in value of property owned by the taxpayer."

It is plaintiff's contention because it suffered a loss each year in its near beer operations, as is shown in Finding VI, that it follows that its good will became worthless in the year 1919. As all the elements which made up plaintiff's good will, with the exception of its right to manufacture and sell beer, remained with the firm until it terminated business in 1925, it might well be argued that plaintiff's loss would have been even greater than it was during its near beer operations but for the value of the remnant of good will which remained as an inseparable part of its business until 1925. We can not escape the conclusion that plaintiff's good will was of some positive advantage to the firm in the manufacture and sale of near beer, and that therefore the year 1919 was not the "identifiable event," as the Supreme Court terms it in *United States* v. *S. S. White Dental Manufacturing Co., supra*, which fixed the loss of plaintiff's good will.

In this connection it may be well to recur to the statement of the Supreme Court in *Metropolitan Bank* v. *St. Louis Dispatch Co., supra*, that good will "is not susceptible of being disposed of independently." The same was the reasoning of the Circuit Court of Appeals in *Red Wing Malting Co.* v. *Willcuts*, 15 Fed. (2d) 626, 633.

Opinion of the Court

The loss of good will, in connection with section 234 (a) (4), *supra*, of the revenue act of 1918, has been the subject of two decisions by the United States Board of Tax Appeals, from which we quote, as follows:

"Good will being merely an incident of a going business, inseparably attached to tangible property and incapable of segregation and independent disposition, it is difficult to conceive upon what theory an allowance for the loss of its alleged value can be made as a deduction under section 234 (a) (4), independently of the tangible property or business to which it is attached. If, and when, the business or property of which the good will is an incident, is disposed of, the gain derived or the loss sustained by reason of the value, or loss of value, of the good will must of necessity be reflected in the return received from the disposition of such business or property. In the instant case the business or property was not disposed of but was continued and in use, and although its value may have been materially reduced, due to the operation of the prohibition law, no deductible loss has been sustained by the petitioner. See *Frederick C. Renziehausen* v. *Commissioner*, 8 B. T. A. 87." (*Garneau Co.*, 8 B. T. A. 1045.)

"In a supplemental brief, petitioner presents the alternative proposition that it is entitled, under the provisions of section 234 (a) (4) of the revenue act of 1918, to deduct from income the loss, based on March 1, 1913, value, arising out of the destruction of its intangibles by prohibition legislation; although it contends that the loss should be spread over the years 1918 and 1919 in conformity with the same principle which would apply in the case of obsolescence. It is difficult to apprehend that the claimed deductions may be brought within the provisions of the statute upon which the petitioner relies. They provide for the deduction of only such losses as are 'sustained during the taxable year'; and surely the facts do not support a finding that petitioner has sustained such a loss as to bring it within those provisions. A loss is sustained, within the meaning of the statute, only when it is a realized loss and is evidenced by a completed and closed transaction, *Appeal of A. J. Schwarzler*, 3 B. T. A. 535; *Appeal of Old '76 Distilling Co.*, 3 B. T. A. 1346; and *A. H. Fell* v. *Commissioner*, 7 B. T. A. 263; and until the investment is converted into terms of money by sale or other disposition, or its worthlessness otherwise demonstrated, there is neither loss nor gain and income is

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neither greater nor less. *Marigold Garden Co.* v. *Commissioner*, 6 B. T. A. 368. Petitioner continued in business after the advent of prohibition; and its good will continued as an inseparable part of the business. There could be no loss in respect of the good will until the business is terminated by sale or other disposition, and neither of these events occurred within the taxable years in question. Cf. *Frederick C. Renziehausen* v. *Commissioner*, *supra*. It is literally true that prohibition wholly destroyed the predominating and most lucrative feature of its business; and that after the advent of prohibition it carried on with a mere remnant of its former business, in new marts of trade. But the most favorable view to the taxpayer to be had in these circumstances is that the March 1, 1913, value of its good will was greatly diminished by prohibitory legislation; but a loss of this character is not within the statute." (*Morand Bros.*, 8 B. T. A. 1266.)

We conclude that the commissioner was correct in denying plaintiff's refund. The petition will be dismissed. It is so ordered and adjudged.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

HARRY R. CARROLL AND LOUIS D. CARROLL, PARTNERS TRADING UNDER THE FIRM NAME OF CARROLL ELECTRIC CO., v. THE UNITED STATES

[No. C-921. Decided May 6, 1929]

On the Proofs

Contracts; delays by Government; breach.—Where an act or omission to act upon the part of the Government causes delay in the performance of a contract, it will not make the Government liable in damages unless it is also a breach of the contract, express or implied.

Same; wage increase; liability of Government.—Where a contract provides that the price named therein shall cover all expenses thereunder, and that if after the date of the contract there shall be a wage increase the Government will pay one-half thereof, the Government, in the absence of a provision in the

contract to the contrary, is not liable for more, notwithstanding such an increase had to be paid because the Government delayed the commencement of the work.

Settlement contract; refused to sign general relase; withholding compensation.—See *Carroll Electric Co.* v. *United States*, 65 C. Cls. 197.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiffs. *King & King* were on the briefs.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. On June 6, 1918, plaintiffs, Harry R. Carroll and Louis D. Carroll, copartners, doing business under the firm name of Carroll Electric company, entered into a contract with the defendant to furnish and install certain electrical equipment at the navy yards at Norfolk and Philadelphia. A copy of said contract with the specifications pertinent thereto is attached to the petition of plaintiff's as Exhibit "A," and is by reference made a part of this finding. This original contract, in so far as it related to work at the Norfolk Navy Yard, was supplemented by an agreement dated January 16, 1920, and a copy of this supplemental agreement is attached to the petition of plaintiff's marked "Exhibit B," and is by reference made a part of this finding.

The fourth paragraph of the contract of June 6, 1918, made the time when the work was to be fully completed dependent on the date of the delivery of the contract to plaintiffs, and in accordance with the provisions of said paragraph the work was required to be done prior to March 21, 1919.

II. Paragraph 11 of Specification No. 2762, which is attached to the original contract marked "Exhibit A," provided that the Government should install certain machinery, connections, and do other work preparatory to and needed for the work which plaintiff's were to do under their contract.

The contractors had made necessary arrangements both for material and for labor which would have enabled them to have completed their work at Norfolk and at Philadelphia well within the time agreed upon for such completion, and could have done so had the United States performed the necessary antecedent work of providing the buildings in which the installations were to be made. At all times the plaintiffs had the machinery and the equipment which they were to supply either in their own stock or held in the factory, or delivered and stored at the site of the work ready for installation as soon as it could be put in place.

Several weeks prior to the delivery and execution of the contract of June 6, 1918, the plaintiffs were advised that they were the low bidders for the work to be done under that contract. Without waiting for the contract to be formally executed they began to order certain of the equipment which they would be required to furnish under the contract. Certain of the equipment was ordered as early as May 6, 1918. Other equipment was ordered on May 13, 1918. On account of the lack of progress on the buildings in which the installations were to be made, the plaintiffs were, with the exception of the erection of certain concrete cell structures, unable to do any work on their contract until about the first week in April, 1919, which was subsequent to the time fixed in the original contract for the completion of all work to be done under it.

A portion of the equipment required to be furnished by the plaintiffs was delicate and highly sensitive. Exposure to moisture would have rendered it ineffective. For that reason the equipment required to be furnished by the plaintiffs could not be installed until the buildings were wholly enclosed and ready to receive it.

III. The work was not completed at Philadelphia until January 27, 1920. The work at Norfolk, under the original contract, was completed August 30, 1919, and that under the supplemental contract was finally completed on February 28, 1920.

The entire delay was caused in the first place by the unreadiness of the building for the work therein to proceed, and later by changes in the work and by interference with

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the progress of the contractors' operations owing to the condition of the building, and was unavoidable on the part of the contractors and conceded to be such by the Government officials having charge of the completion of the work. The original contract provided for extensions of time for the completion of the work in case of unavoidable delays. The plaintiffs, in pursuance of these provisions, applied for and received extensions of time from the defendant.

IV. The original contract provided that:

"The contract price shall cover all expenses, of whatever nature or description, connected with the work to be done under the contract."

This provision was modified by a further agreement which provided that:

"If, after the date of the contract, there shall be any increase in the rates of wages prevailing * * * that shall necessitate payment by the contractor, * * * of wages in excess of those prevailing * * * at the date of the contract, he shall receive additional compensation in a sum equal to one-half the amount of the increase in the rates of wages so required to be paid * * *."

There was an increase in the rates of wages after the date of the contract by reason of which the plaintiffs were required to pay $2,456.84 in labor cost more than would have been necessary if they had been permitted to perform the contract within the period originally contemplated for its completion. The defendant paid one-half of this increase in cost, to wit, $1,228.42. The evidence does not establish that the cost to the plaintiffs of superintendence of work under the contract or that the cost of overhead thereon was increased by delay on the part of the Government.

V. At the time settlement was made for the work under the contract in suit the plaintiffs declined to sign a general release in favor of the Government, because they had a claim then pending for additional compensation, totaling $8,757.00. Before the Government would pay the plaintiffs the amount which the Government admitted to be earned on the said contract it was necessary for the plaintiff to assent to the withholding by the Government of $175.00, or two per cent

of the amount of their said claim. The said sum of $175.00 was accordingly withheld and has not been paid to the plaintiffs. The plaintiffs tendered, and the Government accepted, a qualified release, whereby the plaintiffs reserved the right to bring suit for additional compensation totaling $8,757.00.

The court decided that plaintiffs were entitled to recover, in part.

GREEN, *Judge*, delivered the opinion of the court:

This suit is brought upon a contract to perform certain work and furnish and install certain electrical equipment and apparatus for the defendant. The plaintiffs performed the contract without any fault on their part, and the defendant paid them the contract price, less a deduction of $175.00 which was withheld by the Government as a consideration for making payment without securing the final release provided for by the contract. Repeated decisions by this court have held that the defendant had no right to make a deduction on this ground and the plaintiffs are entitled to recover the amount so withheld.

With reference to the claim of the plaintiffs for damages caused by delays on the part of defendant, the evidence shows that the Government failed to do antecedent work which was necessary before the plaintiffs could commence work upon their part of the contract, and plaintiffs were thereby so delayed that they were unable to commence their work until after the time originally fixed for its completion. The result was that plaintiffs were compelled to pay $2,456.84 more than would have been required had the work been completed within the time originally contemplated by the contract, which they could have accomplished had it not been for the failure of defendant to perform the necessary antecedent work. The Government paid half of this sum and plaintiffs seek to recover the remainder.

Counsel for plaintiffs cite several decisions of this court in support of their contention that as the delays were caused by the failure of defendant to have ready the antecedent

work, plaintiffs are entitled to recover the increase in labor cost caused thereby. In our opinion, none of these cases support this contention.

The original contract provided for delays and stated that they should be considered unavoidable when caused by the Government, and provided that plaintiffs might receive an extension of time by reason of such delays. The original contract also provided that:

"The contract price shall cover all expenses, of whatever nature or description, connected with the work to be done under the contract."

This was modified by a further agreement which provided in substance that in case of an increase in the wage scale after the date of the contract the plaintiffs should receive additional compensation in an amount equal to one-half of the increase so required to be paid by them. In accordance with this agreement, defendant paid one-half of the increased cost in wages.

In each of the cases cited on behalf of plaintiffs it was held that the Government was liable for damages by reason of having caused delay in the performance of the work for which it had contracted. But the fact that the Government caused delay and damage in the performance of the work is not by itself and alone sufficient to make the Government liable, and none of these cases is authority for any such principle. Each depended on the particular facts which pertained thereto and the provisions of the contract, which were quite different from those in the case at bar. The true principle is that the acts of the Government or its omission to act, even though they caused delay, will not make the Government liable in damages unless they constitute also some breach of the contract, either express or implied. In the instant case the contract shows that delays were contemplated, and also that it was expressly stipulated as to what should be done in case of an increase in the wage scale. Both parties to the contract are bound thereby; and the defendant having complied therewith, the plaintiffs are not entitled to recover anything further. The case at bar is in some respects like that of *Crook Co.* v.

United States, 270 U. S. 4, the provision with reference to delays being the same in both cases. In the *Crook case*, *supra*, the plaintiff was not permitted to recover, although delays were caused by the Government. The instant case is in fact stronger than the *Crook case* in favor of the Government, by reason of the special provision as to what should be done in case of an increase in the wage scale.

It follows from what has been said above that the plaintiffs are entitled to recover only the amount of the contract price which was withheld by defendant and is still owing them. Judgment accordingly will be entered in favor of plaintiffs for $175.00.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

ARMOUR & CO. v. THE UNITED STATES

[No. D–532. Decided May 6, 1929]

On the Proofs

Dent Act; acceptance of award; authority of War Department to correct error; authority of accounting officer.—An award made by the War Department under the Dent Act is in effect judicial, and could be supplemented by the War Department for the purpose of correcting an error or doing justice. Payment made under the supplemental award could therefore not properly be deducted by the accounting officer from other funds due the claimant. This is so notwithstanding the terms of the acceptance of the first award purported to discharge the agreement.

The Reporter's statement of the case:

Mr. Conrad H. Syme for the plaintiff.

Mr. Heber H. Rice, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation duly organized and existing under the laws of the State of Illinois.

II. On March 22, 1923, the plaintiff entered into a contract with the United States, through Robert T. Willkie, captain, Quartermaster Corps, contracting officer of the United States, to sell and deliver to the defendant according to terms of contract 100,000 pounds of bacon at the unit price of $0.1975 per pound, said delivery of bacon to commence May 25, 1923, and be completed by June 25, 1923.

III. The plaintiff sold and delivered within agreed specified contract time 99,998 pounds of bacon. The defendant accepted same as complete performance of contract by plaintiff. There then became due plaintiff $19,749.60, of which sum the defendant has paid $12,347.01, leaving a balance of $7,402.59, which amount has been withheld and has not been paid plaintiff under this contract.

IV. On April 22, 1918, defendant gave plaintiff a telegraphic order for approximately 3,500,000 pounds of dressed beef to be distributed at various cantonments in the United States.

The unit price was as follows:

$23.05 cwt. f. o. b. Chicago, Ill.
22.80 per cwt. f. o. b. Missouri River points.
22.95 per cwt. from St. Louis, Mo.
22.60 per cwt. from Fort Worth, Texas, or Oklahoma points, all plus freight and icing.

And the aggregate price was about $803,000.00.

Pursuant to said order plaintiff made deliveries of beef to said cantonments approximating in amount 3,500,000 pounds and received approximate payment therefor in the sum of $787,413.29.

V. The plaintiff on May 9, 1919, filed a claim with the War Department under the Dent Act, which claim, known as PG 1957, was for the sum of $7,402.59, covering certain undelivered or unaccepted shipments of beef to Camps Wadsworth, Wheeler, and Greene, made by plaintiff in 1918 under the order of April 22, 1918.

VI. During the pendency of the claim referred to in Finding V and relating to shipments of beef to Camps Wadsworth, Wheeler, and Greene, plaintiff, under date of June 20, 1919, filed a second and separate claim under the

Dent Act before the same division of the War Department, which claim, known as PG 3594, was for the sum of $5,206.79, covering certain unaccepted shipments to Camp Jackson under the order of April 22, 1918. This claim specified that plaintiff would furnish prior to June 30, 1919, any additional amount to be claimed as reimbursement and remuneration for expenditures, obligations, and liabilities necessarily incurred.

VII. On December 12, 1919, and during the pendency of claim PG 1957, the Secretary of War allowed an award, and payment was made of the second claim, PG 3594, in the sum of $5,240.48.

The award was made on a block award form, which by the retention of certain prearranged phrases and cancellation of certain other prearranged phrases and the insertion agreement upon a fair and equitable basis, and that such sum will not include prospective or possible profits or any of the matter indicated by italicization below was caused to read in part as follows:

"That there have heretofore been delivered by the claimant and accepted by the United States under the said agreement *3,431,783 lbs. dressed beef* of the fair aggregate value of *$787,413.29 (approx.)*; that the said sum of *approx. $787,413.29* paid or to be paid for said articles or work heretofore delivered and accepted, together with the additional sum of *$5,240.48*, will adjust, pay, and discharge such part of the agreement beyond the goods and supplies delivered to and accepted by the United States thereunder and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said agreement.

"The Secretary of War hereby awards to said claimant the sum of *$5,240.48*, which sum, in conjunction with the payments herein above mentioned made or to be made for the articles, work, or services heretofore delivered and accepted shall be in full adjustment, payment, and discharge of said agreement."

No reference was made therein to the first claim, PG 1957, then pending for losses separate and distinct from claim PG 3594.

The plaintiff accepted said award and gave receipt thereof by indorsing the award form and affixing its signature thereto.

VIII. On December 6, 1920, the Secretary of War allowed claim PG 1957, and an award and payment for the full amount of $7,402.59 was made to plaintiff. Said payment of $7,402.59 was thereafter audited by accounting officers of the Government and was disallowed as an overpayment or disbursement of public funds and was thereupon deducted from the amount otherwise due the plaintiff upon the contract involved in the present suit and which is made the basis of its petition.

IX. There is no evidence to show that the award of $7,-402.59 based upon claim PG 1957 was induced by error, fraud, or mistake, or that the said amount was not justly due plaintiff for the losses specified in the claim, or that the losses specified in claims PG 1957 and PG 3594 in any way overlapped.

The court decided that plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff is an Illinois corporation, engaged in the packing and selling of meats. On April 22, 1918, the plaintiff acceded to a telegraphic request to supply the Government with approximately 3,500,000 pounds of dressed beef to be delivered at various camps at varying prices per hundredweight. The transaction at its inception contemplated a consideration of $803,000. The plaintiff performed the contract and received therefor the sum of $787,413.29. Out of the transaction there developed two claims for payment for undelivered and unaccepted beef, one for $7,402.59 relating exclusively to Camps Wadsworth, Wheeler, and Greene; the other for $5,206.79 confined to transactions at Camp Jackson. The plaintiff on May 9, 1919, under the Dent Act filed before the War Department its claim PG 1957 for $7,402.59 alleged shortage in payment, due for the transactions relating to Camps Wadsworth, Wheeler, and Greene, and a little over a month later on June 20, 1919, inaugurated the same proceedings before the same department under the Dent Act for $5,240.48, identified as claim PG 3594, growing out of transactions confined to Camp Jackson. For some reason left unexplained the War Department con-

sidered the last claim first, and on December 12, 1919, with the approval of the Secretary of War allowed it for $5,240.48. About a year later, December 6, 1920, the first claim, PG 1957, was allowed by the department for $7,402.59. The total amount of the claims, $12,643.07, was duly received by the plaintiff and the amount of claim PG 1957, i. e., $7,402.59, was subsequently deducted by the accounting officers of the Government from other funds admittedly due the plaintiff. It is for this amount, $7,402.59, so deducted that the present suit is instituted.

The defendant cites a number of cases to sustain a contention that the acceptance of the first award of $5,240.48, by the express terms of the written instrument according the same, precludes a recovery for the supplementary one of $7,402.59 made December 6, 1920.

We find it difficult to sustain the contention upon the authorities cited. It is true that the total sum of deficiencies claimed for are attributable to the same contract, and it is likewise established that the paper executed by the plaintiff to receive payment of the first award contains, among other provisions, the following:

"Which sum, in conjunction with the payments hereinabove mentioned made or to be made for the articles, work, or services heretofore delivered and accepted, shall be in full adjustment, payment, and discharge of said agreement,"

a clause of a conclusive character, entitled to great weight and casting upon the person seeking to escape final settlement thereunder the burden of showing a contrary intent when the transaction involves an accord and satisfaction. In this case, however, we are not confronted with such a situation. Congress, as is well known, enacted legislation establishing a tribunal to consider and adjudicate the demands of individuals, partnerships, and corporations upon informal contracts with the Government during the war. The authority of the tribunal within the limits of its jurisdiction and in accord with the mode of procedure was plenary, and it is inconceivable that in the event of an obvious error, honest mistake, or manifest injustice, called to its attention in an award made, that jurisdiction to correct the same did not obtain. Judicial procedure embraces the

right to move for new trials and to correct erroneous judgments, or obtain supplementary ones. The awards made were in effect judicial judgments, enforceable in this court (*Gillespie case*, 60 C. Cls. 923), and, of course, the acceptance of an award precluded the right to challenge it later, except for fraud; but the plaintiff is not challenging an award. No mistake entered into the first award, the amount was correct and the determination in accord with the facts. What happened was a contention upon the part of the plaintiff for the supplementary award, a sum in addition to the first award, predicated upon the same basis as to right of recovery, but inadvertently omitted from the other claim. The War Department, under the Dent Act, was not foreclosed from correcting errors or doing justice; when meritorious contentions were advanced involving claims under its jurisdiction, surely authority to correct an erroneous award prevailed. This court in the *Standard Steel Car Co. case*, 60 C. Cls. 726, did not hold the contrary. What we held was simply, as stated in the syllabus:

"A collateral attack upon the judgment of a tribunal having judicial powers, where there is jurisdiction, can only be for fraud."

What the court was asked to do was to review the case of the car company upon its merits, and pass judgment, in the absence of an allegation of fraud, whether under the facts and law applicable the award should have been made. There is nothing in the opinion of the court which remotely suggests the authority of the War Department under the Dent Act is curtailed to a single consideration of a claim, bereft of authority to allow supplementary awards, correcting obvious mistakes and omissions not called to attention during the consideration of the matter in the first instance. That the Government is indebted to the plaintiff in the amount claimed is not disputed; that all the confusion was due to the presentation of two instead of one claim is obvious, and that the board in granting the supplementary award was fully advised as to what had previously occurred and all the facts and circumstances attending the transaction appears clear from the record. No fraud or sharp practice

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is alleged, and no assertion made challenging the good faith of the plaintiff.

Judgment will be awarded the plaintiff for $7,402.59. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

UNION LAND CO. AND ITS AFFILIATED CORPORATIONS, A. H. STANGE CO., KINZEL LUMBER CO., E. W. ELLIS LUMBER CO., AND MT. EMILY TIMBER CO., v. THE UNITED STATES

[No. F-178. Decided May 6, 1929]

On the Proofs

Income and profits taxes; affiliated corporations; invested capital; debenture notes to stockholders.—Where one affiliated company receives from another property against the value of which as carried on its books it issues in part capital stock, and charges the residue in accounts payable as due to its stockholders, issuing thereto against their accounts debenture notes passing by delivery and without endorsement, the debenture notes so issued constitute a liability of the corporation and as regards income-profits tax are not returnable as part of invested capital.

The Reporter's statement of the case:

Mr. W. W. Spalding for the plaintiffs. *Mason, Spalding & McAtee* were on the brief.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiffs in this case are affiliated corporations. The Union Land Company was organized on March 24, 1914, and on June 2, 1914, issued to its stockholders stock having a total par value of $245,000.00. The Kinzel Lumber Company was organized on May 29, 1914, and on June 1, 1914, issued to its stockholders stock having a par value of $105,-000.00. The A. H. Stange Company was organized prior to

the organization of the other two companies named. All three of these companies had the same stockholders who held stock in each corporation in the same relative proportions.

II. On June 10, 1914, the A. H. Stange Company transferred to the Union Land Company property which was subsequently carried upon the books of the Union Land Company as having a value of $3,431,382.61 and also $60,000.00 in cash. The actual value of this property so transferred, including the cash, was $4,189,968.81.

On June 10, 1914, the A. H. Stange Company transferred to the Kinzel Lumber Company cash, notes, and real estate, which the Kinzel Lumber Company carried upon its books on June 11, 1914, as having a book value of $315,000.00.

III. The Union Land Company charged or carried against the book value of the property transferred to it by the A. H. Stange Company, its capital stock in the amount above stated, and also charged $3,234,000.00 in accounts payable, this sum being the aggregate of the amounts shown by the books of account as due to the several stockholders. On July 1, 1914, the said Union Land Company issued to its stockholders debenture notes in the amount of $3,185,000.00 against the amount of stockholders' accounts, as above stated, leaving a balance of $49,000.00, which was paid to the stockholders.

On June 11, 1914, the Kinzel Lumber Company carried on its books against the assets valued, as stated in Finding II, at $315,000.00, capital stock to the amount of $105,000.00 and accounts payable to its stockholders in the total amount of $210,000.00. On the date last named the said Kinzel Lumber Company distributed to its stockholders in proportion to their stockholdings the sum of $70,000.00, leaving a balance of $140,000.00, for which amount debenture notes were issued to the stockholders in proportion to their stockholdings.

The debenture notes issued as aforesaid by the Union Land Company and the Kinzel Lumber Company were payable in twenty years without interest, and contained a provision that they were to be a first lien on all of the assets

of the company which issued them, and that they might be registered but otherwise should pass by delivery and without endorsement.

IV. About April 30, 1919, the plaintiffs, Union Land Company, A. H. Stange Company, Kinzel Lumber Company, and E. W. Ellis Lumber Company, being affiliated companies, duly filed their consolidated corporation income-profits-tax return for the calendar year 1918, showing a tax liability of $45,310.99, which amount was duly paid by the Union Land Company to the collector of internal revenue; and about January 21, 1924, each of the plaintiffs herein executed and submitted to the Bureau of Internal Revenue an income-profits tax waiver extending for one year the statutory period for the assessment and collection thereof as to the calendar year 1918.

In said consolidated income-tax return the Union Land Company listed as a liability and as then outstanding debenture notes of the Union Land Company in the amount of $2,940,000.00 and of the Kinzel Lumber Company $140,-000.00, and also in its schedule of capital, surplus, and undivided profits included the same amount of debenture notes for each company.

V. Upon examination of the consolidated return of plaintiffs referred to in the preceding finding, the Commissioner of Internal Revenue in May, 1924, reduced the invested capital by the amount of the debenture notes, to wit, $3,080,000.00, and by reason of this reduction assessed an additional tax against the plaintiffs of $41,520.07.

VI. On January 29, 1925, the plaintiff, the Union Land Company, paid under protest to the collector of internal revenue at Milwaukee, Wisconsin, $41,520.07, being the amount of the additional assessment of income and profits taxes for the calendar year 1918, levied as stated in the preceding finding; and on August 21, 1925, the plaintiffs, the Union Land Company and affiliated corporations, filed a claim for the refund of the said $41,520.07. This claim was rejected and none of the amount claimed has been paid.

The ground of said claim was the deduction from invested capital of the amount of debenture notes shown by the re-

turn to have been outstanding in 1918, and listed by plaintiffs in their original return for that year as part of invested capital.

The court decided that plaintiffs were not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiffs in this case are affiliated corporations and as such filed a consolidated corporation income-profits-tax return for the calendar year 1918. The Commissioner of Internal Revenue made an additional assessment of taxes in the amount of $41,520.07 above the amount shown to be due by this return. The plaintiff, the Union Land Company, paid the amount of this additional assessment under protest, and having duly filed a claim for refund, brings this suit to recover the amount so paid.

The evidence shows that in 1914 the A. H. Stange Company, one of the plaintiffs, transferred to the Union Land Company and the Kinzel Lumber Company, also a plaintiff, a large amount of property, including some cash. The two last-named corporations had the same stockholders as the A. H. Stange Company, and the stockholders held their stock in the same proportions. The property transferred to the Union Land Company, not including cash to the amount of $60,000.00, was entered on the books of this company at a value of $3,431,382.61, although in fact its value was much greater. The property and cash transferred to the Kinzel Company amounted to $305,000.00, and after this transfer its total assets were in book value $315,000.00. The property so transferred to these companies, respectively, was carried upon their books as an asset. The Union Land Company had, including cash, assets of a total book value of $3,491,382.61. Against this book value of assets the books showed that capital stock to the amount of $245,000.00 had been issued and the several stockholders had been credited with accounts payable in a total amount of $3,234,000.00. Against these stockholders' accounts the Union Land Company issued debenture notes to its stockholders of a face value of $3,185,000.00, leaving a balance of $49,000.00 on

the accounts, which was paid to the stockholders. The Kinzel Lumber Company issued capital stock to the amount of $105,000.00. Its books showed accounts payable to its stockholders to the amount of $210,000.00. Having distributed the amount of $70,000.00 in cash, the Kinzel Company issued debenture notes to its stockholders in proportion to their stockholdings to the amount of $140,000.00, and thereby extinguished the accounts. All of these transactions occurred in 1914.

The debenture notes so issued were payable on or before twenty years from date, were a lien on the property of the corporation which issued them, and might be registered. Otherwise, it was provided that they should pass by delivery and without endorsement.

In making its consolidated income-tax return for 1918 the Union Land Company listed as a liability as then outstanding debenture notes of the Union Land Company in the amount of $2,940,000.00 and of the Kinzel Lumber Company $140,000.00, and also in its schedule of capital, surplus, and undivided profits included the same amount of debenture notes for each company. The controversy in this case is wholly as to whether the amount of these debenture notes could properly be included in the invested capital of the companies which issued them. The commissioner held that they could not, and by reason thereof assessed the additional tax which the plaintiffs now seek to recover.

We know of no valid principle under which the amount of these notes could be held to be part of invested capital. The plaintiffs argue that their issuance was not equivalent to making a dividend. We do not think that the issuance of these notes to take up outstanding accounts due the stockholders constituted a dividend, but this does not bring the notes within the definition of invested capital.

The revenue act of 1918, 40 Stat. 1057, stated very definitely what items could be included in invested capital. There is nothing in these notes or the transactions through which they were issued that can even remotely be connected with the items described and set forth in this statute as

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constituting invested capital. Among other things, the statute says that—

"Actual cash value of tangible property, other than cash, bona fida paid in for stock of shares, at the time of such payment, * * *" [sec. 326 (*a*) (2)]

is within the meaning of "invested capital" as used in the title under consideration, and it seems to be claimed that these notes are covered by this provision.

The debenture notes, as before stated, were given to take up and extinguish open accounts due the stockholders. The credits given by these accounts, it is true, arose by reason of property being transferred to the corporation by the stockholders, but neither these accounts nor the notes which were given to take them up were property "paid in for stock or shares." In fact, neither the accounts nor the notes were the property of the corporation. The notes passed by delivery and without endorsement and became the property of whoever held them. Although these notes did not mature for twenty years, they constituted an indebtedness and were a liability of the corporation and were, as before stated, listed as a liability in plantiffs' return for the year involved. Under no sound theory can an ordinary liability such as a bill or bills payable become a part of invested capital.

As the statute also provides that borrowed money shall not constitute a part of invested capital, the plaintiffs seek to show that neither these notes nor the indebtedness represented by them represented borrowed money. In the case of *Unterberg & Co.* v. *United States*, 64 C. Cls. 197, 204, a case quite similar to the one at bar, this court held that the fund for which the debenture notes involved therein were executed was borrowed money, but we do not find it necessary to determine the question in the instant case. The provision of the statute with reference to borrowed money was evidently intended merely to remove any possible doubt as to the status of money which had been borrowed. It did not in any way enlarge the meaning of the words "invested capital," as otherwise defined by the statute, and the plaintiffs in order to justify their contention,

must show that the debenture notes were within this definition. This they have failed to do. It follows that plaintiff, the Union Land Company, was not entitled, in making its consolidated return, to include in its invested capital the amount of the debenture notes, and that it and its affiliated corporations can not recover herein.

Judgment will be entered dismissing plaintiffs' petition.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

RUFUS M. OVERLANDER, CHARLES L. OVERLANDER, JESSE L. OVERLANDER, JOHN E. OVERLANDER, SUSAN M. OVERLANDER, AND JACOB A. OVERLANDER v. THE UNITED STATES

[No. E-462. Decided May 6, 1929]

On the Proofs

Estate-transfer tax; notes of distributees; inclusion in gross estate.—The value of certain of testator's property being established by proof taken, refund of part of an estate-transfer tax is allowed accordingly, and denied as to the residue. Unpaid balances of principal and interest on promissory notes payable to decedent, executed by his sons, representing advances of money at the time the notes were given, upon the mutual understanding that any unpaid balance was to be taken out of their shares of the estate, which was done, *held* to be a part of the gross estate, and properly returned as such.

Same; interest on refund; refusal to submit proper evidence to commissioner.—Where the Commissioner of Internal Revenue notifies the administrator of an estate that a part of his claim for refund of taxes would be prepared for allowance, but that it would be necessary before final settlement that evidence be submitted as to the persons entitled to share in the refund, and such evidence is refused, interest on the allowance is not recoverable beyond the date the commissioner rejected the claim for lack of such evidence.

The Reporter's statement of the case:

Mr. Jacob A. Overlander for the plaintiffs. *Messrs. George W. Offutt* and *Ross H. Snyder* were on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. P. E. Miller* was on the brief.

The court made special findings of fact, as follows:

I. Rufus B. Overlander died testate on January 15, 1919, in the city of Hiawatha, Brown County, Kansas, devising all of his real and personal property to plaintiffs as by the terms, conditions, and limitations in his will set forth, a copy of which is attached to the petition and by reference made a part of these findings.

II. John E. Mathewson, as administrator with the will annexed of Rufus B. Overlander, deceased, paid all expenses of administration and all charges and expenses provided by decedent's will then presently payable or not otherwise paid by plaintiffs themselves, and made final accounting of all personalty of said estate in his hands or under his control to the distributees entitled thereto by order of the probate court, Brown County, Kansas, on October 17, 1919, before any notice of, or due date of any taxes assessed, levied, or paid or to be assessed, levied, or paid herein.

III. Plaintiffs filed a return upon decedent's property under Form 706, exempt and nonexempt, at the time of his death, aggregating the gross sum of $69,690.35 ($48,500, real estate; $21,190.35, personalty) less deductions claimed for decedent's debts, funeral expenses, support of dependents, executor's fees, attorney's fees, administration expenses, etc., amounting to $2,237.74, and less exemptions claimed as advancements to two distributees in the sum of $7,568.74, together with the exemption of $50,000 to resident decedents, as provided by act of Congress, known as revenue act, approved September 8, 1916, acts amendatory thereof, and supplemental thereto, aggregating $59,806.48, leaving a net taxable estate of $9,883.87, and tax thereon of $197.68, which was assessed and paid.

IV. In his audit of the aforesaid return the Commissioner of Internal Revenue determined the gross estate to be $110,167.41 ($88,500, real estate; $21,667.41, personalty), less deductions of the kind described in Finding III, amounting to $1,199.15, together with exemption of $50,000 to resident decedents, aggregating $51,199.15, leaving a net taxable estate of $58,968.26, and tax thereon of $1,358.73, or $1,161.05 in excess of $197.68 theretofore assessed and paid. The additional tax of $1,161.05 was paid under protest and as follows:

On June 30, 1920	$126.15
July 29, 1920	25.23
March 1, 1921	673.12
March 8, 1921	168.28
April 22, 1921	168.27
	1,161.05

Claim for refund of said sum of $1,161.05 was filed by the estate with the appropriate collector of internal revenue on or about June 20, 1921, and the attorney of the estate was notified by the Commissioner of Internal Revenue March 14, 1922, that the claim would be prepared for allowance in the sum of $23.60 and rejected as to $1,137.45, but that it was necessary before final settlement be made that evidence be submitted as to the persons entitled to share in the refund.

The said attorney refused to submit the evidence and the commissioner on May 19, 1922, rejected the claim of $1,161.05 in its entirety.

On October 6, 1924, reconsideration of the rejection was requested, and was denied by the commissioner October 31, 1924.

V. Differences between the estate-tax return and the commissioner's determination on review are as follows:

Gross estate:	As returned	Determined on review
Real estate	$48,500.00	$88,500.00
Liberty bonds	950.00	961.11
Growing crops	Nothing.	216.66
Household goods	Nothing.	250.00
Clerical error	2.00	----------
Notes of decedent's sons	Nothing.	7,568.73

Reporter's Statement of the Case

Deductions:	As returned	Determined on review
Monument	340.00	Nothing.
Probate costs	Nothing.	30.00
Support of dependents—		
Widow, legacy	500.00	Nothing.
Widow, taxes paid by heirs	206.51	7.92
Notes of decedent's sons	7,568.73	Nothing.

The defendant now concedes that the item of $250, household goods, should be excluded from the gross estate, and that the item of $340 for a monument is a proper deduction, the excess payment of taxes by reason of such corrections being $23.60. (Finding IV.) The item of $30, increase in deductions on account of probate costs is not in question.

VI. The fair market value of all real property at the time of his death, January 15, 1919, of which decedent died seized, was $69,000.00.

VII. There is no proof of the fair market value of decedent's interest in bonds at the time of his death.

VIII. There is no proof of the fair market value of decedent's interest in growing crops at the time of his death.

IX. Satisfactory evidence has not been adduced by either party respecting the deductions of real-estate taxes ($206.51 as returned, $7.92 as corrected on review), or the legacy to the widow of $500, both claimed as support of dependents.

X. The tax return of decedent's estate shows unpaid balances of principal and interest on certain several promissory notes payable to decedent, executed by two of his sons, as follows:

	Date of note	Unpaid principal	Unpaid interest	Total
C. L. Overlander	May 14, 1917	$1,500.00	$50.53	$1,550.53
C. L. Overlander	July 18, 1917	500.00	12.38	512.38
C. L. Overlander	Dec. 12, 1918	1,000.00	4.65	1,004.65
J. L. Overlander	Feb. 8, 1911	2,500.00	1,143.05	3,643.05
J. L. Overlander	Aug. 21, 1916	750.00	108.12	858.12
		6,250.00	1,318.73	7,568.73

The principal sums were advances of money to the sons by decedent at the time the notes were given upon the mutual understanding that any unpaid balance was to be taken out of their several shares of the estate at the time of the father's

death. Upon the father's death the balances, together with interest then due, were deducted from the sons' shares of the personal property.

The court decided that plaintiffs were entitled to recover $581.16 with interest at the rate of six per cent per annum on $244.61 from March 1, 1921, to May 19, 1922, on $168.28 from March 8, 1921, to May 19, 1922, and on $168.27 from April 22, 1921, to May 19, 1922, and with interest on $557.56 ($581.16 less $23.60, which plaintiffs could have received before the commissioner's rejection) from May 19, 1922, to such date as the Commissioner of Internal Revenue might determine, in accordance with the provisions of subsection (b), section 177 of the Judicial Code, being a part of the revenue act of May, 1928.

Moss, *Judge*, delivered the opinion of the court:

Plaintiffs are asking to recover the sum of $1,161.04 paid as estate tax on the estate of Rufus B. Overlander, who died January 15, 1919. The claim is based on the contention that the gross estate of decedent has been erroneously increased by the Commissioner of Internal Revenue, and also that certain deductions claimed by the executors were erroneously disallowed by the commissioner in determining the net estate.

The real estate, which consisted of a farm of 360 acres and a certain piece of town property, was returned by the executors as of the value of $48,500. The commissioner determined its value to be $88,500. In determining this value the commissioner has taken the maximum estimate on both farm land and town property. The lowest estimate on the farm by a Government witness is $63,000, and this is the highest estimate given by any of plaintiffs' witnesses. It amounts to $175 per acre. In our opinion this is a fair value for the farm land. The sum of $6,000 on the town property is the highest estimate for the plaintiffs and the lowest for the Government, and this amount, we believe, represents the correct value for same. The value therefore determined by the commissioner will be reduced from $88,500 to $69,000.

Syllabus

It is conceded that the item of $250 for household goods should be excluded from the gross estate, and that the item of $340 for a monument is a proper deduction, the excess payment of taxes by reason of such corrections being $23.60 (Finding IV). The item of $30 increase in deductions on account of probate costs is not in question.

There is no proof of the fair market value of decedent's interest in bonds, nor as to the growing crops at the time of decedent's death, nor is there satisfactory evidence respecting the deductions of real-estate taxes ($206.51 as returned, and $7.92 as corrected on review), or the legacy to the widow of $500, both items being claimed as support of dependents.

Certain notes executed by decedent's sons in the aggregate sum of $7,568.73 were included by the executors in the gross estate, but plaintiffs contend that same should have been deducted in the recapitulation of the estate-tax return, and this contention was denied by the commissioner. The principal sums of these notes were advances by the decedent to his sons upon the mutual understanding that any unpaid balance was to be taken out of their several shares of the estate at the time of the father's death, and this was done. The ruling of the commissioner as to this item was correct. Plaintiffs are entitled to recover herein the sum of $581.16 with interest, and it is so adjudged and ordered.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

JOHNSTON LIVINGSTON v. THE UNITED STATES

[No. F-145. Decided May 6, 1929]

On the Proofs

Income tax; salary of stockholder; distribution of earnings.—A ruling by the Commissioner of Internal Revenue, in his audit of a company's return, that the salary paid to one of its stockholders was excessive under section 214 (a) of the revenue acts of 1918 and 1921. and that the excess should be treated

therein as a distribution of earnings, does not convert such excess into dividends received by the stockholder, deductible in the stockholder's income-tax return. For the purpose of the stockholder's return of income the excess is salary, having come to him as salary and not as dividend.

The Reporter's statement of the case:

Mr. Robert Ash for the plaintiff. *Messrs. Thomas J. Reilly* and *E. S. Griffing* were on the brief.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a citizen of the United States, whose address is care of J. Livingston & Company, Grand Central Terminal, New York, N. Y.

II. During the years 1920 and 1921 the plaintiff was president of J. Livingston & Company, a corporation organized under the laws of the State of New York. The plaintiff, together with John G. Livingston, treasurer, and Frank W. Cooper, secretary, had complete control and management of J. Livingston & Company, and rendered personal services to that corporation.

III. The stock of J. Livingston & Company was owned as follows:

	Common	Preferred
Johnston Livingston	132	185
John G. Livingston	243	790
Frank W. Cooper	125	----------
	500	975

IV. In its income and excess-profits tax returns for the years 1920 and 1921 J. Livingston & Company reported as expense and deducted from gross income salaries of $30,000 each paid plaintiff, John G. Livingston and Cooper in 1920, and salaries of $23,333.32 each paid plaintiff, John G. Livingston and Cooper in 1921. These salaries were paid and deducted from gross income in computing the corporation

taxes in accordance with section 214 (a) of the revenue acts of 1918 and 1921, which provide:

"That in computing net income there shall be allowed as deductions:

"(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered."

V. Upon the audit of the income and excess-profits tax returns of J. Livingston & Co., for 1920 and 1921, the Treasury Department ruled that the salary paid the plaintiff was not reasonable, and disallowed as expense $6,666.68 of the said salary for 1920 and $6,666.66 for 1921. The disallowed portion of the salaries was held by the Treasury Department to be dividends or distributions of earnings.

VI. As a consequence of the disallowance as expense of a portion of the salaries mentioned and treating them as distributions of earnings, J. Livingston & Co. did pay, on April 17, 1925, an additional tax of $5,383.84.

VII. Plaintiff paid his 1920 and 1921 personal income taxes within the time prescribed by law. Such taxes as paid included the normal tax on the whole salary received from J. Livingston & Co., a portion of which was later disallowed by the Treasury Department, as indicated above.

VIII. On April 30, 1925, the plaintiff filed claims for the refund of $533.33 for 1920 and $629.33 for 1921. The claims were based on the ground that the salaries disallowed as expense to J. Livingston & Co. had been treated as dividends or distributions of earnings by the officials auditing the corporation's returns, and that the normal tax paid by him should be refunded.

IX. Under date of October 14, 1925, the Treasury Department advised plaintiff that his claims for refund had been rejected, as the Personal Audit Division considered the whole amount received by him to be salary, and that the action by the Corporation Audit Division did not affect the personal returns.

X. By reason of the action of the Treasury Department in holding that the amounts disallowed as salaries to J. Livingston & Co. were distributions of earnings in computing the taxes of J. Livingston & Co., but were salaries in computing the taxes of the plaintiff, the refund of $533.33, plus interest from April 12, 1922, and $629.33, plus interest on $617.29 from December 15, 1922, and on $12.04 from September 15, 1925, has been refused.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

This tax case is rested upon a ruling of the Commissioner of Internal Revenue with respect to allowable deductions from the gross income of J. Livingston & Company, a New York corporation. The plaintiff is the president of the above corporation and received a salary as such in 1920, $30,000, and in 1921, $23,333.32.

Section 214 (a) of the revenue acts of 1918 and 1921 provides in part as follows:

" That in computing net income there shall be allowed as deductions:

" 1. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered."

Article 105 of Treasury Regulations #45 and #62, interpreting the foregoing statute, reads as follows:

"Among the ordinary and necessary expenses paid or incurred in carrying on any trade or business may be included a reasonable allowance for salaries or other compensation for personal services actually rendered. The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services. This test and its practical application may be further stated and illustrated as follows:

"(1) Any amount paid in the form of compensation, but not in fact as the purchase price of services, is not deductible. (*a*) An ostensible salary paid by a corporation may be a distribution of a dividend on stock. This is likely to occur in the case of a corporation having few stockholders, practically all of whom draw salaries. If in such a case

the salaries are based upon or bear a close relationship to the stockholdings of the officers or employees, it would seem likely that the salaries, if in excess of those ordinarily paid for similar services, are not paid wholly for services rendered, but in part as a distribution of earnings upon the stock."

The commissioner in auditing the returns of the corporation determined that the salary paid to the plaintiff for the years involved was unreasonable, and declined to allow a deduction from its gross income of the full amount paid, reducing the same as to this plaintiff in the sums of $6,666.68 in 1920 and $6,666.66 in 1921, asserting at the time as a basis for the ruling, in accord with the foregoing regulations, that these sums had been paid the plaintiff from the earnings of the corporation as dividends. The plaintiff thereupon filed a claim for a refund, asking the return to him of $1,162.66, alleging the overpayment of his normal income tax in this amount, due to the ruling of the commissioner that he had received for the years 1920 and 1921, $13,333.34 as dividends from the earnings of the corporation and not as salary.

Section 216 of the revenue act of 1918 provides, in part, as follows:

"That for the purposes of the normal tax only there shall be allowed the following credits:

"(a) The amount received as dividends from a corporation which is taxable under this title upon its net income."

Section 216 of the revenue act of 1921 provides:

"That for the purpose of the normal tax only there shall be allowed the following credits:

"(a) The amount received as dividends (1) from a domestic corporation."

The commissioner rejected the plaintiff's refund claim, assigning, among other reasons, that as the sums paid to the plaintiff as salary in 1920 and 1921 bore no relationship to the plaintiff's proportionate ownership of stock of the corporation they were not deductible as dividends received.

The plaintiff received and returned as income, subject to the normal tax rate, the full amount he received as salary

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for the years in question, and paid the tax assessed. Whatever else may be said, it is indisputable that the sums paid the plaintiff were, in fact, paid to him as salary, and in no way predicated upon his stock holdings in the corporation. It is true that the commissioner justified the disallowance of the sums here involved, as deductions from the gross income of the corporation, upon the basis of a distribution of earnings, and if in fact and in law the sums paid were dividend distributions, they were under the quoted statutes, payable, so far as the normal tax is concerned, at the source. However, it is at once apparent that the sums received by the plaintiff were not received as dividends, and under the record herein may not be held to be such. It was a voluntary distribution to the plaintiff of a fixed sum as compensation for services rendered, irrespective of ownership of stock, and in nowise calculated upon the basis of a distribution of earnings as a dividend. The commissioner in auditing the tax return of the Livingston corporation was under the law empowered to disallow unreasonable salaries paid to officials of a corporation as deductions from gross to ascertain net income. By so doing he did not convert an actuality into what he may have termed in his rulings as something else. What the law exacted was an audit of the corporation's returns to ascertain its tax liability, and the commissioner's ruling did not and could not change what the corporation's officials actually did into the voting of dividends instead of salaries. Dividends are not declared and paid in the way and manner herein claimed and there is no record of the declaration or payment of any dividends to stockholders whatever.

The corporation paid the plaintiff in cash the sums stated, and the plaintiff received them as salary for the two years involved. Much more might have been paid, if otherwise legal, and the corporation so determined; but obviously the payments so made are subject to the scrutiny of the commissioner, who from all the facts in the case is charged with the duty of ascertaining, notwithstanding payment to the officials, whether deduction of the same is proper under the

revenue laws, to the corporation. The commissioner was not concerned with the sums disbursed by the corporation to its officials, except as the returns reflected its gross and net income. If the corporation from its earnings was moved to vote a liberal allowance to an employee or official, predicated in part on service rendered and in part on sentiment or as a bonus, assuredly it may not be said that the recipient receives the same as a dividend. Manifestly the sums received are income and taxable as such.

The vulnerability of the plaintiff's argument is seemingly attributable to a contention that because the commissioner designated the distribution of the sums involved as dividends they are dividends, notwithstanding the record is in direct conflict therewith.

We discern nothing inconsistent in the result. A corporation's income-tax return is one proceeding; an individual's is quite another. If as a matter of proven and acknowledged fact the taxpayer receives $30,000 in one year as a salary and $23,333.32 upon precisely the same circumstances the next year, it is difficult to perceive wherein it falls short of being income as such. It is obvious that the amount paid by the corporation may not be deducted from the gross income of the plaintiff to ascertain this net income upon this single basis when it is admitted by the plaintiff that he actually received the claimed deduction as a salary. The deductions allowable to the individual in his income-tax returns are not necessarily determinable upon the sums allowed a corporation of which he is a salaried official. He like any other taxpayer, must establish his affirmative right thereto by independent proof when seeking to recover an alleged illegal tax exaction. This has not been done.

The petition will be dismissed. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

EDISON STORAGE BATTERY CO. (NOS. F-359 AND H-322), EDISON STORAGE BATTERY SUPPLY CO. (NOS. F-358 AND H-324), EDISON STORAGE BATTERY GARAGE, INC. (NOS. F-403 AND H-323) v. THE UNITED STATES

[Decided May 6, 1929]

On the Proofs

Excise tax; automobile parts; storage batteries.—Storage batteries manufactured, advertised, and sold for the supply of motive power in electrically propelled trucks are subject to the excise tax as parts of automobile trucks under section 600 of the revenue act of 1924.

Same; use of the word "parts."—The word "parts," as used in section 600 (2) of the revenue act of 1924 imposing an excise tax on automobiles and parts, etc., is generic and in order to effectuate the purpose of the statute must be used in its widest and general sense and not in a technical or limited sense. That Congress did not intend to give the word a limited meaning is evidenced by the fact that Congress did not exempt the article used in connection with the operation of an automobile where it was also available for other purposes.

Same; administrative rules and regulations.—Where Congress gives an officer power to make rules and regulations for carrying certain acts into effect, it is to be assumed that the officer in making them exercised the care, fairness, and knowledge that the subject required. Where they are reasonable and do not violate the spirit and purpose of the acts involved, they will be upheld, and where a taxpayer comes within the language of the rules and regulations, the burden is upon him to show that they are unreasonable and violate the spirit and purpose of the act.

Same; evidence.—Each case involving the application of the excise tax on automobile parts and accessories must rest upon its own facts and a reasonable application thereto of the statute and regulations.

The Reporter's statement of the case:

Mr. Thomas G. Haight for the plaintiff. *Messrs. Robert H. Montgomery, J. Marvin Haynes, William Diebold,* and *Henry Lanaham* were on the briefs.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway,* for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Edison Storage Battery Company, is a corporation duly incorporated on May 25, 1901, under the laws of the State of New Jersey, with its principal place of business at West Orange, New Jersey.

The plaintiff, Edison Storage Battery Supply Company, is a corporation duly incorporated on February 3, 1913, under the laws of the State of New Jersey, with its principal place of business at West Orange, New Jersey.

Prior to August 5, 1926, plaintiff, Edison Storage Battery Garage, Incorporated, was a corporation duly incorporated on January 6, 1919, under the laws of the State of New Jersey, and had its principal place of business at West Orange, New Jersey. It was dissolved on August 5, 1926, and the trustees in dissolution under the New Jersey statute are Thomas A. Edison, Charles Edison, John V. Miller, Harry F. Miller, and Henry Lanahan.

The plaintiff, Edison Storage Battery Company, owns all the shares of capital stock (except one share held by each director as a qualifying share) of the plaintiffs, Edison Storage Battery Supply Company and Edison Storage Battery Garage, Incorporated. The plaintiffs, Edison Storage Battery Supply Company and Edison Storage Battery Garage, Incorporated, were formed on the initiative of the directors of the Edison Storage Battery Company for the purpose of facilitating the conduct of business in certain States and in New York City, respectively.

II. The plaintiff, Edison Storage Battery Company, during the period from February 25, 1919, to February 26, 1926, was engaged in the business of manufacturing and selling Edison storage batteries.

The plaintiffs, Edison Storage Battery Supply Company and the Edison Storage Battery Garage, Incorporated, during the said period did not manufacture or assemble any storage batteries or any of the parts that go to make a storage battery of the Edison type. The batteries sold by the said plaintiffs were purchased by them complete from the Edison Storage Battery Company.

The plaintiff, Edison Storage Battery Supply Company, was engaged in the business of selling Edison storage bat-

teries in certain States where the local laws made it difficult for the Edison Storage Battery Company to do business, and maintained service stations for the replacement, repair, inspection, and adjustment of storage batteries sold by it.

The plaintiff, Edison Storage Battery Garage, Incorporated, was engaged in selling Edison storage batteries only in New York City and there maintained a service station for the replacement, repair, and general storage of batteries sold by them. The company did not do a general garage business.

III. By various and sundry payments beginning May 29, 1920, and ending April 3, 1926, the plaintiffs paid to the collector of internal revenue, manufacturer's excise taxes imposed under section 900, subdivision 3, of the revenue acts of 1918 and 1921, respectively, and under section 600, subdivision 3, of the revenue act of 1924, on completed storage batteries and battery parts sold separately and presumably used in automobiles.

The payments so made by the Edison Storage Battery Company for the respective companies are as follows:

Date of payment	Edison Storage Battery Company	Edison Storage Battery Supply Company	Edison Storage Battery Garage, Incorporated	Date of payment	Edison Storage Battery Company	Edison Storage Battery Supply Company	Edison Storage Battery Garage, Incorporated
1920				1922			
May 29	$20,109.77	$2,930.04	$670.07	Jan. 31	$1,408.36	$28.81	$38.04
June 30	1,547.12	220.76	89.90	Feb. 28	1,646.72	227.80	45.19
July 31	1,591.60	706.73	35.31	Apr. 1	1,590.95	284.57	63.46
Aug. 31	2,692.41	648.63	94.88	Apr. 1	2,637.36	199.38	58.24
Sept. 30	1,530.26	530.41	62.74	Apr. 29	2,704.59	44.60	32.28
Oct. 30	967.72	227.17	44.26	May 31	1,830.44	12.33	27.86
Nov. 30	1,506.18	460.52	85.29	June 30	1,843.84	101.86	28.95
Dec. 31	937.57	----------	112.00	July 31	1,720.56	77.62	16.35
				Sept. 1	921.00	140.00	3.29
1921				Sept. 30	661.39	23.84	----------
Jan. 31	2,989.92	450.67	123.41	Nov. 1	1,622.93	2.86	----------
Feb. 28	2,091.64	135.00	84.31	Dec. 1	1,355.12	122.90	16.16
Mar. 31	876.03	17.39	50.58	Dec. 30	2,107.40	139.45	7.78
May 2	334.72	426.24	78.65				
June 1	1,370.42	15.66	30.89	1923			
June 30	627.37	125.74	49.41	Jan. 31	3,398.66	115.76	1.91
July 31	1,256.29	58.40	26.80	Mar. 1	2,209.16	208.17	3.44
Aug. 31	655.50	143.52	65.46	Apr. 2	2,020.75	7.36	9.20
Nov. 30	1,138.52	23.38	31.58	Apr. 30	3,736.65	161.65	3.81
Oct. 31	286.95	17.86	44.43	May 31	1,417.62	153.67	3.40
Dec. 31	754.74	61.74	36.50	June 30	1,367.02	64.27	.81

Reporter's Statement of the Case

Date of payment	Edison Storage Battery Company	Edison Storage Battery Supply Company	Edison Storage Battery Garage, Incorporated	Date of payment	Edison Storage Battery Company	Edison Storage Battery Supply Company	Edison Storage Battery Garage, Incorporated
1923				1925			
July 31	$883.95	$68.53	----------	Jan. 31	$1,193.52	----------	----------
Aug. 31	389.48	99.64	$1.34	Feb. 28	1,105.02	$24.61	----------
Sept. 29	512.42	171.60	----------	Mar. 31	779.51	60.44	----------
Oct. 31	1,609.57	71.76	----------	Apr. 30	2,087.02	93.46	----------
Nov. 30	668.06	249.14	----------	June 2	949.79	118.03	----------
Dec. 31	1,167.17	109.58	----------	June 30	707.72	75.20	$0.93
1924				July 31	795.05	258.49	3.70
Jan. 31	1,374.98	108.92	10.90	Aug. 31	757.35	4.37	10.99
Feb. 29	1,008.48	198.42	.78	Sept. 30	593.15	120.30	17.25
Mar. 31	1,175.15	330.29	4.24	Oct. 31	1,207.94	84.78	28.28
Apr. 30	1,335.39	330.28	1.93	Dec. 1	1,464.95	27.56	88.41
May 30	1,087.08	126.09	18.12	Dec. 31	1,461.80	184.27	100.64
June 30	689.75	66.29	----------				
July 31	437.82	42.89	----------	1926			
Aug. 30	617.17	----------	----------	Jan. 30	1,308.26	66.93	122.58
Sept. 30	302.43	27.61	----------	Mar. 2	1,369.93	143.50	47.09
Oct. 31	----------	98.73	----------	Apr. 3	794.36	28.53	----------
Nov. 29	568.70	44.02	----------		110,523.02	12,836.56	2,633.80
Dec. 31	654.80	85.54	----------				

The said payments were made in accordance with sworn returns filed by the plaintiffs accompanying the remittances.

IV. (1) An Edison storage cell is composed of a steel container and a positive and negative group of plates immersed in an alkaline electrolyte. The container is a steel can of rectangular shape. The positive plates are composed of stamped-out steel grids in which are assembled tubes containing nickel hydrate and nickel flake. The negative plates consist of stamped-out steel grids in which are assembled flat pockets containing iron or iron oxide. The positive and negative plates are assembled and arranged alternately. The plates are mechanically and electrically secured together in such a way that all of the positive plates are connected together electrically and all of the negative plates are connected together electrically. The positive and negative plates so arranged are then placed in a steel container in which there is an alkaline solution which completes the cell.

(2) An Edison storage battery is one or more cells assembled in a wooden crate or tray. The cells are electrically connected with one another by copper rods and cast terminals which is the only connection between the cells.

(3) The sizes of batteries depend upon the number of cells, and the number of cells in a battery is determined by the space available and the power required. The cells are assembled in standard trays.

(4) The chemicals, materials, and parts which go to make up the different types of cells and storage batteries manufactured by the Edison Storage Battery Company and sold by the three plaintiffs are all the same. The cells differ only in size and the number of plates.

(5) The size and number of the plates determine the capacity of the cells—that is the amount or amperes of electric current. The voltage of each cell is the same—1.2 volts.

V. Plaintiffs, during the period in question, manufactured and sold storage batteries, which were adaptable for different uses, dependent upon the number of cells contained in the battery and the type of cell. For assembling completed batteries, plaintiffs manufactured and used 9 types and 30 sizes of cells. By types is meant the height of the plates or tubes in the cells, and by size is meant the number of plates or tubes. Letters were used to designate the types and numbers to designate the sizes for assembling. An A—4 cell designated a cell in which two rows of tubes or plates were superimposed one on the other and in which there were four positive tubes or plates. The cells were made up with one more negative plate than positive. The batteries, with relation to which the taxes in question were collected, employed the A, B, or G type of cell.

VI. The Edison storage batteries were assembled in standard trays of cells ranging from one to ten cells. Larger batteries were made up of multiple trays. The different uses to which Edison batteries were adaptable required batteries of different sizes ranging from batteries with one cell to batteries of 240 cells. The batteries taxed were mainly batteries of 66 cells, which were sold direct to consumers for the propulsion of electric trucks, a specific case being trucks used by the Corby Baking Company in Washington for delivering bread. Some of the batteries taxed consisted of 5-cell and 8-cell batteries. These were sold by the plain-

tiffs to consumers, who employed them for lighting on gasoline automobiles and trucks. The Edison batteries that were adaptable for typical uses, other than those mentioned above, required a different voltage than the two uses specifically mentioned. The principal factors in determining the size of a battery for a particular use are the power required and the space available. Batteries sold for use on other than automobiles were not taxed.

VII. The Edison batteries are not used to furnish electric current in connection with the ignition system to start internal-combustion automobile engines. The lead battery is used for this purpose, having a quick discharge. The plaintiffs' batteries have a slow discharge. The two types are similar in other respects.

VIII. Plaintiffs' batteries were invented, designed, and developed by Thomas A. Edison, and were first commercially marketed in 1909. The batteries on which taxes were paid are of the same principle and substantially of the same design and method of construction as the batteries first marketed in 1909 by Thomas A. Edison with some improvements.

IX. The storage batteries with respect to which the taxes in question were assessed were especially adaptable for supplying the motive power for electrically-propelled automobile trucks, and for lighting on automobiles, and were sold for these specific purposes.

X. Plaintiffs on or about September 17, 1923, filed with the collector of internal revenue for the fifth district of New Jersey claims for refund of taxes paid from February 25, 1919, to August 31, 1923, as follows:

Edison Storage Battery Co	$80, 738. 68
Edison Storage Battery Supply Co	9, 484. 93
Edison Storage Battery Garage, Inc	2, 177. 98

The claims for refund were rejected and entirely disallowed by the Commissioner of Internal Revenue on January 23, 1926.

On or about September 14, 1926, the plaintiffs filed with the collector of internal revenue for the fifth district of New

Jersey claims for refund of taxes paid from September 1, 1923, to February 26, 1926, as follows:

Edison Storage Battery Co	$29,787.34
Edison Storage Battery Supply Co	3,351.63
Edison Storage Battery Garage, Inc	455.82

XI. The said claims for refund were rejected and entirely disallowed by the Commissioner of Internal Revenue on April 14, 1927.

XII. Subsequent to the passage of the revenue act of 1918, and prior to May 14, 1919, an officer of the several plaintiffs discussed with Charles V. Duffy, then collector of internal revenue for the fifth district of New Jersey, the question as to whether the plaintiffs were required by that law to report sales of batteries sold by them respectively, and which were presumably used in automobiles. The said collector advised the plaintiff, Edison Storage Battery Company, on May 14, 1919, that there would be no penalty for a failure to file returns showing such sales, pending a definite decision as to whether the excise tax imposed by the said act applied to Edison storage batteries. Thereafter, at the request of the said collector, the plaintiff, Edison Storage Battery Company, furnished the collector with a statement in writing describing the Edison storage battery, and was subsequently advised that such batteries when used in automobiles were taxable under the said act.

XIII. Included in total taxes paid by the plaintiffs, as set out in Finding III, is the sum of $33,985.56, representing taxes on Edison storage batteries sold to the American Railway Express Company by the plaintiffs for use on electrically-propelled trucks used in the business of said company, being that of express forwarders. Of this sum $33,740.74 was paid on returns of the Edison Storage Battery Company, $193.75 on returns of the Edison Storage Battery Supply Company, and $51.07 on returns of the Edison Storage Battery Garage, Inc.

XIV. In assembling the aforesaid trucks, the practice of the American Railway Express Company was as follows: It purchased the chassis, batteries, windshields, and other parts, and in some cases the bodies, cabs, brake rods, bush-

ings, pins, and accessories, such as tarpaulins and battery carriers, from the manufacturers thereof, and in some cases manufactured itself the bodies, cabs, brake rods, bushings, and pins. The various parts were assembled by the American Railway Express Company into completed trucks, which were then painted. About 700 of such trucks are produced each year by the American Railway Express Company and used in its business as carriers and forwarders of express.

The court decided that plaintiffs were not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

There are involved here six cases which by order of the court dated May 11, 1928, were consolidated. Two suits each brought by the three corporations by agreement were briefed, argued, and submitted as one case.

The details of the relations and operations of these corporations are set out in the findings, and it is not necessary for the decision to rehearse them here.

They are seeking a refund of taxes assessed on storage batteries manufactured and sold for motive power for electrically-propelled automobile trucks.

The question involved is whether or not storage batteries manufactured and designed to meet, and meeting, the exact specifications required for use in furnishing motive power for electrically-propelled automobile trucks, advertised for this purpose, and sold for this specific use, are subject to excise sales tax as "parts" of automobile trucks under section 600 [1] of the revenue act of 1924, 43 Stat. 322. We hold that they are liable.

[1] On and after the expiration of thirty days after the enactment of this act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentage of the price for which so sold or leased:

(1) Automobile truck chassis and automobile wagon chassis sold or leased for an amount in excess of $1,000, and automobile truck bodies and automobile wagon bodies sold or leased for an amount in excess of $200 (including in both cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), 3 per centum. A sale or lease of an automobile truck or of an automobile wagon shall, for the purpose of this subdivision, be considered to be a sale of the chassis and of the body;

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There have been a number of cases similar to the instant cases decided by this court and apparently there will be others of a similar kind; that is to say, cases involving a tax on the manufacture of batteries of different kinds, which to a greater or lesser degree and in one form or another, with and without attachments and with and without changes, are used on automobiles and automobile trucks. In each case there is an attempt by a construction of the statute and by proof of slight differences in the facts, the use, the method of attachment, something necessary to be done to attach the battery to the frame, to show that the plaintiff in interest was not subject to taxation. These efforts to show exemption from taxation, for that is what they amount to, grow out of refinements and strained constructions of the act of Congress.

Section 900 [2] of the revenue acts of 1918 and 1921, 42 Stat. 291, after providing for a sales tax on automobiles, automobile trucks, motor cycles, etc., provides (3) for a sales tax where tires, inner tubes, parts or accessories for any of the articles enumerated in subdivision (1) or (2) are sold to any person other than the manufacturer or producer of any of the articles enumerated in subdivision

(2) Other automobile chassis and bodies and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or lease of an automobile shall, for the purpose of this subdivision, be considered to be a sale of the chassis and of the body;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 2½ per centum. This subdivision shall not apply to chassis or bodies for automobile trucks, automobile wagons, or other automobiles.

[2] That [" from and after January 1, 1922," under 1921 act] there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages of the price for which so sold or leased:

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum.

(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum.

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum.

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(1) or (2), section 600 of the revenue act of 1924. The litigation grows out of construction put upon "parts and accessories." The statutes were passed by Congress for the purpose of raising revenue for the conduct of the Government. They were necessary acts of sovereignty, and these and all taxing statutes must be construed, as far as possible, to effectuate that purpose. While it is true that if there is a doubt as to the taxpayer's liability it should be resolved in his favor, it is also true that in considering the conditions out of which this doubt grows the purpose of the statutes must be given full consideration.

Furthermore it is to be assumed that Congress, if it intended to give an exemption, would have so stated, or have limited the language of the statutes so as to afford clearly an exemption, and therefore, when it uses the generic word "parts," which must be taken in its broadest signification to effectuate the purpose of the statutes, it intended it to be used in its widest and general sense and not in a technical or limited sense.

Congress did not intend that the application of the acts should be based upon such a labyrinth and tangle of distinctions in its application.

In *Worth Brothers Co.* v. *Lederer*, 251 U. S. 507–510, the court in discussing the meaning of the words "any part" in the munitions tax act (sec. 301, c. 463, 39 Stat. 781), which provides "that every person manufacturing" certain articles and "shells" "or any part of the articles mentioned * * * shall pay" an excise tax, etc., said:

"Is not every element (we use the word for want of a better) in the aggregation or composition or amalgamation (whichever it is), of a shell, a part of it? If not, what is it? And what is the test to distinguish a part from not a part?"

And further, speaking of the contention that forgings were not a part of a shell, the court said:

"Congress did not intend to subject its legislation to such artificialities and make it dependent upon distinctions so refined as to make a part of a shell not the taxable 'part' of the law."

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See also the case of *Forged Steel Wheel Co.* v. *Lewellyn*, 251 U. S. 511, affirming the *Worth case*, and construing the same statute.

As was said by the court in *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501, 505, in construing the same statute as that involved in the *Worth case*, the rule of construction "can not be carried to reduce the statute to empty declarations." The rule of construction will not be pressed so far as to reduce a taxing statute to a practical nullity by permitting easy evasion.

It is fair to assume that if Congress had intended in the use of the word "parts" to exempt the seller where the thing sold was used in connection with the operation of an automobile, automobile truck, or motor cycle, because of the fact that the article sold could be used for other purposes, or that only a small portion of the production of the seller was used in connection with automobiles, or automobile trucks, or because the article sold could be used for other purposes, or because it had been sold and used for other purposes before the passage of the act, or because it required something to be done by the purchaser to attach it to the automobile, or because, when shipped, all the parts that constituted the article sold were not put together or were shipped in different packages and required something to be done by the purchaser in order to apply them, it would have stated as much in the act. Having failed to do this, it is fair to assume that it did not intend that a limited meaning should be given to the word "parts." See *United States* v. *Rindskopf*, 105 U. S. 418; *United States* v. *Anderson*, 269 U. S. 422, 443; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 520; *United States* v. *Mitchell*, 271 U. S. 9, 12; and *Wickwire, etc.*, v. *Reinecke*, 275 U. S. 101.

Further, the acts authorized the Commissioner of Internal Revenue to make rules and regulations for carrying them into effect. It is recognized that Congress in enacting such statutes could not go into all the details of administrative application and definition, and therefore intrusted this to the Commissioner of Internal Revenue. It is to be assumed

that the commissioner in making the regulations[3] exercised the care and fairness and the knowledge of the subject required for preparing the regulation. And so the courts have held that if the regulation is reasonable and does not violate the spirit and purpose of the act involved, it should be upheld, and also that where the regulation applies, where the taxpayer seeking relief comes within the language of the regulation, the burden is upon him to show clearly and satisfactorily that the regulation is unreasonable and violates the spirit and purpose of the act—another way of saying that where a taxpayer claims that he has been illegally assessed and taxed the burden upon him is to establish the illegality.

The Commissioner of Internal Revenue has undertaken to define "parts and accessories." In the rapid changes that are being made in the construction of automobiles, automobile trucks, etc., and the parts and accessories used in the operation of them, by inventions, improved construction, and the application to them of articles used for other purposes with or without slight changes, or which had previ-

[3] Treasury Department Regulations 47 are in part as follows:

ART. 14. * * *. Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer, is subject to tax as a "part" or "accessory."

* * * * * * *

ART. 15. * * * any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as component part of such vehicle.

* * * * * * *

Articles, however, which ordinarily would be classed as commercial commodities, become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adapted for use as such a component part.

* * * * * * *

ART. 16. * * * any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

* * * * * * *

Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motor cycles are not subject to tax as "parts" or "accessories." * * *

ously been used for other purposes, it is readily appreciated that the regulations and definitions must, as far as possible, have a general application and could not possibly be so expressed as to cover all possible exigencies and every diversity of circumstances; and, therefore, in the interest of securing to the Government the income which the taxing acts were designed to provide, cases such as this must be approached in the light of what has been stated.

It is also clear that no general rule can be laid down in cases like the instant one, and that each of these cases involving different articles must rest upon its own facts and the fair and reasonable application to it of the statute and the regulations.

This court has decided several cases involving parts and accessories, commencing with the *Atwater Kent case*, 62 C. Cls. 419, which held that timers and coils were not to be classified as parts of automobiles simply because they might be used on automobiles, in the absence of proof that at the time when sold it was intended that the articles should be used on automobiles, and where also there had been no setting aside or allocation by advertising or otherwise of timers or coils for automobile use. It will be seen that that case stood upon its facts and must be left there. It was intended to establish no binding rule, and in so far as it may be construed to be in conflict with the views herein stated, it is hereby modified.

In the prior case of *Martin Rocking Fifth Wheel Co.* v. *United States*, 60 C. Cls. 466, there was involved a semi-trailer whose body overlaps the frame of the drawing vehicle. It was a separate article, not used in connection with the operation of the automobile, etc., but attached to it and moved by it, and contributed nothing to the operation of an automobile or its use, and was not a part of its structure when in operation.

The next case, the *National Rubber Filler Co.* v. *United States*, 63 C. Cls. 337, concerned a substance used to fill up the inside of worn-out tubes, and was nothing more than the application externally of a substance to prolong the life of a tube, as the repainting of a car prolongs the life of the body.

It was not an integral part of the machine, nor was it a part of its original construction. It might be that to-morrow this material would be utilized by some invented process to make complete tires to be used as such in the operation of an automobile. It unquestionably would then become a part. This illustrates the shifting sands upon which the construction of the statute rests. Each of these cases, it also appears, rested on its own facts.

The last case decided by this court was *Cole Storage Battery Co.* v. *United States*, 65 C. Cls. 164, in which on October 29, 1928, a writ of certiorari was denied by the Supreme Court. In that case it was held that a storage battery especially adapted and so designed and advertised as to meet the essential requirements of motive power is a part or accessory of an automobile, and this was held to be true of the battery in that case. It was further held that where the device or battery is necessary to the accomplishment of the functioning in a certain way of the combination of various elements and parts of the machine, it is a part or accessory of the machine, and that where the manufacturer who seeks the custom of the automobile trade advertises the special qualities of his product and claims its advantageous use as a part of an automobile or automobile truck, the battery comes within the statute and regulation of the commissioner.

The decision in that case is controlling in this. While the Edison battery might not perform exactly the same function as the Cole battery, it possesses all the characteristics necessary for a battery, in that in the automobile industry it is utilized for furnishing motive power for automobile trucks. The particular class of batteries taxed here was extensively advertised for this use by the plaintiffs and when sold these batteries were shipped direct to the consumers of batteries for the operation and propulsion of electric street trucks. The facts establish that several classes of automobile trucks used storage batteries for motive power, and that they would serve no useful purpose without the battery. The plaintiffs' batteries, which were taxed, could be and were applied to these uses. It also appeared that some of the trucks when sold were equipped with Edison

batteries. The fact that these batteries in voltage requirements are used for other purposes does not affect the issue. Nor is the matter of the assemblage of batteries in standard trays relevant. The facts clearly show that the Edison battery possesses all the necessary characteristics of a battery for furnishing, and does furnish, motive power to automobile trucks. The fact that these batteries can be used for other purposes is not important. There are many parts of an automobile that can be and are used for other purposes. The form of battery taxed here was clearly specially adapted and designed and advertised to meet the requirements of motive power on automobile trucks. The plaintiffs were only taxed for batteries sold in connection with the operation of automobile trucks. The cases relied upon in plaintiffs' brief deal with the tax classification of an entire product and the incidental use independent of the principal use. Had the Commissioner of Internal Revenue taxed the plaintiffs on all their storage batteries, irrespective of their adaptable use, it would have presented a different case. But this was not done in these cases. The batteries taxed were the batteries admittedly sold for use in the operation of automobile trucks, advertised for that use, and when sold shipped direct to the consumers for that use.

It follows that the plaintiffs can not recover. But, further, the plaintiffs have clearly failed to establish any right to exemption or to show to the satisfaction of the court that the commissioner's regulation under which this tax was assessed and collected was unreasonable, much less in violation of the spirit and purpose of the act. We think it was altogether reasonable and in full accord with the spirit and purpose of the act.

The petition in each of the said six cases submitted, viz, Nos. F-359 and H-322, F-358 and H-324, and F-403 and H-323, should be dismissed and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

GEORGE W. ALLEN v. THE UNITED STATES

[No. H-453. Decided May 6, 1929]

On the Proofs

Navy pay; act of June 10, 1922; warrant and commissioned officers; gunner and ensign; base and longevity pay.—The provision in the act of June 10, 1922, that "for officers in the service on June 10, 1922, there shall be included in the computation all service which is now counted in computing longevity pay," refers to commissioned and not warrant officers. A gunner in the Navy, who accepted a commission as ensign May 27, 1924, was therefore an "officer" appointed after July 1, 1922, and is only entitled to count his commissioned service in computing his base and longevity pay.

Same; reduction of pay; act of May 18, 1920.—Where on July 1, 1922, in accordance with section 10 of the act of June 10, 1922, a warrant officer in the Navy received pay that was higher than the pay saved him under section 16 of said act, which excluded from the pay saved the increase of section 3 of the act of 1920, but less than the pay including such increase, the officer's pay was not reduced in violation of said section 16, nor was there any provision of statute whereby on May 27, 1924, the date he accepted a commission of ensign, the pay he was receiving on June 30, 1922, was revived.

Same; ensign and commissioned warrant officer.—An ensign of the Navy is not a commissioned warrant officer, and section 1 of the act of June 10, 1922, which provides "that a commissioned warrant officer promoted from the grade of warrant officer shall suffer no reduction of pay by reason of such promotion," does not apply to him.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the briefs.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, George Washington Allen, has had service in the United States Navy as follows:

Reporter's Statement of the Case

Enlisted service

Enlisted October 28, 1908. Discharged October 27, 1912.
Enlisted January 27, 1913. Discharged January 17, 1917.
Enlisted March 20, 1917. Accepted appointment as gunner (temporary) September 29, 1917.

Officer service

September 28, 1917, temporarily appointed gunner, Ordnance, from September 24, 1917.

January 15, 1918, temporarily appointed ensign, from December 15, 1917.

September 6, 1918, temporarily appointed a lieutenant (junior grade) from July 1, 1918.

October 11, 1919, appointed a lieutenant (temporary) from July 1, 1919.

December 29, 1921, accepted and executed oath of office as gunner from August 5, 1920.

December 31, 1921, temporary appointment as lieutenant terminated by operation of law and reverted to status as gunner (permanent).

January 5, 1922, appointed gunner August 5, 1920 (conf. desp.).

May 6, 1924, commissioned regular ensign from February 9, 1924.

May 27, 1924, accepted appointment and executed oath of office as ensign.

February 9, 1927, became lieutenant, junior grade, at expiration of three years from commission as ensign and regularly commissioned from that date.

II. On and for a time previous to May 27, 1924, the date plaintiff accepted his commission as ensign, he was in receipt of the pay of a warrant officer after twelve years' service on sea duty at the rate of $189 a month, and from and after May 27, 1924, was paid at the following rates: May 27, 1924, to June 17, 1925, $131.25 a month; June 18, 1925, to June 17, 1926, $175.00 a month; June 18, 1926, to September 30, 1927, $183.33 a month, and thereafter as a commissioned officer entitled to count only commissioned service in the computation of his pay.

III. In the computation of plaintiff's pay after May 27, 1924, he has not been given credit for service as an enlisted man or as a warrant officer either for period or longevity pay purposes. He has, however, been credited with all prior commissioned service under Federal appointment in accordance with section 1 of the act of June 10, 1922, 42 Stat. 627.

If entitled to the difference between the pay and allowances received by him and the pay and allowances of an ensign to February 9, 1927, and thereafter as a lieutenant, junior grade, with over fifteen years' service for the period from May 27, 1924, to March 31, 1928, as a result of crediting enlisted and warrant service there would be due him the sum of $3,368.53.

If plaintiff was entitled, as a commissioned officer, to the benefit of section 16 of the act of June 10, 1922, the rate of pay saved to him by said section would be $166.67 per month. From and after June 18, 1925, plaintiff, as an ensign, received pay at the rate of $175 per month. If entitled as an officer to the benefit of section 16 of the act of June 10, 1922, the additional pay that would accrue to the plaintiff for the period from May 27, 1924, to June 17, 1925, one year and twenty-one days, would be the difference between $166.67 per month saved and $131.25 per month received, or $449.87. After June 18, 1925, the pay of plaintiff exceeded $166.67 per month.

The court decided that plaintiff was not entitled to recover.

Sinnott, *Judge*, delivered the opinion of the court:

Plaintiff entered the United States Navy in 1908 and served in enlisted grades until September, 1917, when he was temporarily appointed a warrant officer, a gunner. In January, 1918, he was temporarily appointed as ensign, and in September, 1918, temporary lieutenant, junior grade. In October, 1919, he was appointed temporary lieutenant from July 1, 1919, and served as such until December 31, 1921, when all temporary appointments terminated by operation of law, and plaintiff reverted to his status of a warrant officer, as a temporary gunner. On January 5,

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1922, he was permanently warranted as gunner to rank from August 5, 1920. On May 27, 1924, plaintiff accepted a commission as an ensign in the regular Navy to rank from February 9, 1924.

In computing plaintiff's pay after May 27, 1924, he was not given credit for services as a warrant officer for either period or longevity pay purposes. However, he was credited with all prior temporary commissioned service, in accordance with the first provision on the top of page 627, of section 1, of the act of June 10, 1922, 42 Stat. 625, which is as follows:

"For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay, except active commissioned service under a Federal appointment and commissioned service in the National Guard when called out by order of the President."

It is plaintiff's contention that he is entitled to credit for both his prior enlisted and warrant officer service in the computation of his period and longevity pay, in accordance with the second provision on the top of page 627, of section 1, of the act of June 10, 1922, *supra*, which is as follows:

"For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay, * * *."

On June 30, 1922, plaintiff was a warrant officer, viz, a gunner. It seems clear to us that the second provision last above quoted from section 1 of the act of June 10, 1922, was not intended to embrace warrant officers. A mere reading of section 1 shows that this section preceding the two quoted provisions was confined solely to the pay of commissioned officers.

The following are the salient provisions of said section 1, which precede the two provisions above quoted from the top of page 627, 42 Stat.:

"That, beginning July 1, 1922, for the purpose of computing the annual pay of the commissioned officers * * * of the Navy below the grade of rear admiral * * * pay periods are prescribed, and the base pay for each is fixed as follows:

"The first period $1,500; the second period, $2,000; * * *.

* * * * * * *

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"The pay of the second period shall be paid to * * * ensigns of the Navy, and officers of the corresponding grade who have completed five years' service.

"The pay of the first period shall be paid to all other officers whose pay is provided for in this section.

* * * * * * *

"Every officer paid under the provisions of this section shall receive an increase of 5 per centum of the base pay of his period for each three years of service up to thirty years."

It is apparent that the pay of *commissioned* officers, and not *warrant* officers, is alone therein treated. The word *officer* is repeatedly used, and must be taken to refer to the pay of *commissioned* officers used in the first sentence of section 1, by every rule of reasonable construction.

Our views in this respect are confirmed by sections 9 and 10 of the act of June 10, 1922, *supra*, which specifically provide for the pay of *warrant* officers, and with a different rate of longevity pay, making it clear that when the word *officer* is used in section 1, only *commissioned* officers are referred to.

We must conclude that plaintiff falls within that class of officers appointed "on or after July 1, 1922," and is only entitled to count his commissioned service in computing his base and longevity pay, in accordance with the first provision of section 1 of the act of June 10, 1922, found on the top of page 627, 42 Stat., and that he does not come within the second provision on said page. This is also the holding in 4 Comp. Gen. 237.

The plaintiff asserts a second or alternative claim. On June 30, 1922, he was receiving pay as a warrant gunner at the rate of $187.67 per month, consisting of $167.67 pay and $20 per month granted by section 3 of the act of May 18, 1920, 41 Stat. 601.

Section 16 of the act of June 10, 1922, *supra*, provides:

"That nothing contained in this act shall operate to reduce the pay of any officer on the active list below the pay to which he is entitled by reason of his grade and length of service on June 30, 1922, not including additional pay authorized by the act entitled 'An act to increase the efficiency of the commissioned and enlisted personnel of the Army, Navy, and Marine Corps, Coast Guard, Coast and

Geodetic Survey, and Public Health Service,' approved May 18, 1920; * * *."

Under this section pay at the rate of only $167.67 per month was saved to the plaintiff as pay at the rate of $20 per month, granted by section 3 of the act of May 18, 1920, *supra*, was not saved in said section 16.

On July 1, 1922, the plaintiff received the higher grade of pay provided by section 10 of the act of June 10, 1922, *supra*, for warrant officers with twelve years' service, namely, $168 a month for shore duty and $189 a month for sea duty. Therefore, it is not apparent how plaintiff's pay was reduced under the act of June 10, 1922, *supra*.

The plaintiff took advantage of the new rate of pay provided in section 10 of the act of June 10, *supra*. He can not, nor is there any provision in the statutes, as is pointed out in defendant's brief, by which he can on May 27, 1924, the date he accepted a commission as ensign, revive the old rate of pay he was receiving on June 30, 1922, under the superseded law. There is no provision in the 1922 act providing saved pay to a warrant gunner upon his promotion to a commissioned grade carrying a lower rate of pay.

Plaintiff cites from section 1 of the act of June 10, *supra*, the following provision:

"That a commissioned warrant officer promoted from the grade of warrant officer shall suffer no reduction of pay by reason of such promotion."

It is sufficient to say that plaintiff was promoted to the commissioned class of *ensign*, and not to that of a commissioned *warrant officer*.

We are of the opinion that plaintiff's petition should be dismissed. It is so ordered and adjudged.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

AMERICAN BRONZE POWDER MANUFACTURING CO. v. THE UNITED STATES

[No. F-362. Decided May 6, 1929]

On the Proofs

Income and profits taxes; accrual basis; estimated tax.—Where tax returns are made on an accrual basis, the tax-paying corporation estimating its income, the corporation must also under the law compute its invested capital for profits tax purposes by using in the calculation of reductions from such capital taxes assessable and payable for the taxable year, although they are not assessed or do not become due until during the following year. This is so notwithstanding the taxing statute was not passed until the latter part of the taxable year.

Same; invested capital; proof of income accrued at time of payment of dividends; payment from surplus.—Where in the above circumstances proof is adduced as to the income accrued at the time dividends are paid, the invested capital is to be averaged by using the income so proved to have accrued to determine how much of the dividends are to be taken as paid from surplus.

The Reporter's statement of the case:

Mr. Henry H. Dinneen for the plaintiff.

Mr. Alexander H. McCormick, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, American Bronze Powder Manufacturing Company, is a New Jersey corporation, a citizen of the United States, and engaged in the manufacture of bronze powders, having its principal place of business at Verona, New Jersey.

II. On December 31, 1916, the plaintiff's books showed that it had as invested capital, capital stock to the amount of $300,000.00 and surplus and undivided profits amounting to $199,845.56, or a total of $499,845.56. The books of the

plaintiff during the years involved in this case were kept on an accrual basis.

III. Plaintiff's Federal income taxes for 1916 amounted to $4,622.86, and in accordance with an original and an amended return filed for the year 1917 plaintiff paid as taxes for that year a total amount of $67,710.99.

IV. Plaintiff's net income for the year 1917 amounted to $173,074.35. The commissioner held that a tentative tax of $53,279.86 had accrued thereon. Accordingly he deducted the amount last named from the net income, leaving $119,794.49 available for dividends. Plaintiff paid on January 14, 1917, a dividend of $150,000.00. From January 1, 1917, to June 30, 1917, the plaintiff's net earnings were $160,166.06, and in the succeeding six months of said year were $12,908.29. The commissioner prorated the net income available for dividends as stated above on a monthly basis and found that for the 13 days of 1917 which had elapsed before the dividend had been paid income to the amount of $4,186.36 had accrued; and subtracting the sum last named from the amount of the dividend he found that there had been paid on the date of the dividend from surplus $145,813.64. Averaging or prorating this for the remainder of the year, he found the amount deductible from the invested capital on account of this dividend to be $140,718.09.

V. Plaintiff also paid on June 30, 1917, a dividend of $150,000.00. The commissioner made his calculations for the amount to be deducted on account of this dividend in the same manner as set forth in Finding IV and found the accrued income for the period between the first dividend and the one mentioned in this finding to be $55,378.10. Subtracting this sum from the dividend, he found that there was $94,621.90 of the dividend paid from surplus, and prorating this for six months he found the amount to be deducted from invested capital on account of the second dividend to be $47,513.79, and that after all of the reductions specified in Finding IV and this finding had been made the corrected invested capital was $306,930.91.

VI. Thereafter, under a computation of the tax in the manner described in the two preceding findings and as fur-

ther set forth in the statement attached to Exhibit No. 1 of the petition, which is made a part hereof by reference, the agents of the defendant levied an additional assessment against the plaintiff of $6,128.81, which sum was paid by the plaintiff to the defendant under protest on July 11, 1924, and although a refund of this sum made in due form has been demanded, no part thereof has been paid to the plaintiff.

The court decided that plaintiff was entitled to recover $2,968.90, with interest from July 11, 1924.

GREEN, *Judge*, delivered the opinion of the court:

This is a suit to recover an alleged overpayment of $6,128.81 on excess-profits taxes for the year 1917. The books of plaintiff were kept on an accrual basis, and the Commissioner of Internal Revenue in computing the invested capital of plaintiff for the year 1917 deducted its 1916 Federal income taxes amounting to $4,622.86. In order to determine the amount available for dividends in 1917, the commissioner also deducted a tentative tax for that year. Both of these deductions are alleged by the plaintiff to have been erroneous, and it also claims that even if these deductions were correct there was error in determining the amount of accrued income for application upon dividends to which reference will hereinafter be made.

As there is no dispute over the facts, the question to be determined with reference to these deductions is whether they should be made during the taxable year or during the year when they were due and payable.

Considering first the deduction of the taxes of 1916, we find that the balance sheet of plaintiff, made as of date December 31, 1916, showed that its capital stock was $300,000.00 and surplus $199,845.56. The total of these items, $499,-845.56, was treated as the invested capital as of that date, which indicates that the amount of the income taxes for 1916 ($4,622.86) had not been deducted at that date. This is in effect conceded in plaintiff's printed brief wherein it is said in substance that this sum was a part of the plaintiff's undivided profits on January 1, 1917, and not due and owing

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until March 15, 1917, and that its deduction upon or before January 1st was erroneous. The theory of the commissioner was that where the books were kept on an accrual basis, taxes should be deducted during the year for which they were levied and assessed; and this not having been done, the taxes of 1916 were accordingly deducted by him in ascertaining the invested capital at the close of the year 1916, or, what is the same thing, on January 1, 1917.

Was the commissioner correct in ruling that the taxes of 1916 should be deducted in that taxable year?

The question here arising has been directly passed upon in the case of *United States* v. *Anderson*, 269 U. S. 422. In that case the action of the commissioner in determining the munitions tax of the plaintiff for 1917 was reviewed. The taxpayer had deducted the 1916 tax in its return for the year 1917. The commissioner held that the munitions tax of 1916, paid in 1917, "should have been deducted from the appellee's (taxpayer's) gross income in its return for 1916." The sole question in the case was whether the action of the commissioner was correct. The books of the taxpayer having been kept on an accrual basis, the court decided that the commissioner had ruled correctly; thereby in effect holding that where the books were kept on an accrual basis the tax was deductible in the year for which it was levied and assessed, although it did not become due and payable until the following year. As there has been some claim that this decision depended also upon the fact that the taxpayer had set up upon its books a reserve for the payment of taxes which had accrued, it becomes necessary to consider some of the language used in the opinion, which will show that the case turned upon the fact that the taxpayer kept its books upon an accrual basis. It is true that the additional fact that it set up in 1916 a reserve for the taxes of that year was also mentioned, but this was by way of argument in showing the manner in which this system of bookkeeping was carried out. No bookkeeper or accountant would for a moment contend that where books were kept upon an accrual basis that items of liability which had accrued in the year 1916 should be charged or deducted other than in that year,

even though they matured later, and the Supreme Court specifically held that the "tax here in question did not stand on any different footing than other accrued expenses." As the plaintiff in the case at bar kept its books on an accrual basis, it took credit on its books in 1916 for items which had accrued in its favor, but which did not become due and payable until a later year. It would seem clear that if the plaintiff, in estimating its income for application upon dividends or for increase of its surplus and invested capital, could use items which had accrued in its favor, it also must permit deductions for liabilities that had accrued against it. On this point the court said in the *Anderson case:*

"In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it. In this respect, for purposes of accounting and of ascertaining *true income for a given accounting period*, the munitions tax here in question did not stand on any different footing than other accrued expenses appearing on appellee's books. In the economic and bookkeeping sense with which the statute and Treasury decision were concerned the taxes had accrued." (Italics ours.)

The action of the commissioner in the instant case in deducting the 1916 tax was therefore correct.

The action of the commissioner in deducting a tentative tax for 1917 from the net income for that year in order to ascertain the amount available for dividends in that year was fully sustained by the decisions of this court in the cases of *D'Olier et al.* v. *United States*, 61 C. Cls. 895 (certiorari denied 273 U. S. 700), and *Child and Fullerton* v. *United States*, 63 C. Cls. 356. The *D'Olier case* is an absolutely parallel case with the case at bar in every respect except that a partnership instead of a corporation was involved, which fact is not material to the decision. The same tax and the same year were involved and likewise dividends in excess of the amount of accrued income were made and the books kept on an accrual basis. The computation of the deductions to be made from invested capital

was made in a different manner, but the effect was the same, and the sole question in the case was the same. The decision in the *D'Olier case* was made upon the authority of the *Anderson case*, wherein, as applicable to the *D'Olier case* and the case at bar, in addition to what has already been quoted, it was said:

"The appellee's true income for the year 1916 could not bave been determined without deducting from its gross income for the year the total cost and expenses attributable to the production of that income during the year."

In the case at bar the deduction was made from what was called the net income, but the result is the same in ascertaining the amount available for dividends whether it be deducted from gross income or net income. If the rule laid down by the *Anderson case* was applicable in 1916, it must also have been applicable in 1917.

Counsel for plaintiff argue against this practice, in the case now under consideration, that the excess-profits statute did not become a law until October 3, 1917, and therefore the tax imposed thereby could not have accrued at the time when either of the dividends were made. This, we think, is immaterial. The law was retroactive and the tax imposed became a liability on October 3, 1917, and should have been a charge upon the books of the plaintiff from and after that date; and as the reduction in invested capital is prorated through the year, an approximately correct result was obtained. It will be noticed also that the munitions tax, which did not become a law until September 8, 1916, was held in the *Anderson case* to have been properly deductible in that same year. We think the fact that the excess-profits tax was not imposed until October 3, 1917, does not prevent its being deductible in that year when the books are kept on an accrual basis.

Our attention has been called to several decisions of the Board of Tax Appeals which, it is contended, announce a view opposed to that expressed above. We have examined with care the cases cited and others on the same subject rendered by the Board of Tax Appeals and find that in none of them did it appear that the books of the taxpayer

were kept on an accrual basis. For that reason we find nothing inconsistent in these decisions. We have also examined two recent cases from different Circuit Courts of Appeals which involve the same general subject. In so far as these cases imply a criticism of the decision in the *D'Olier case*, it would seem that it had not been observed that in that case the books of the taxpayer were kept on an accrual basis. Otherwise, as there is no showing that the books were kept on an accrual basis, it is not necessary to consider the ruling therein made.

One other question remains to be determined in computing the amount of accrued income at the time the dividends were made. The commissioner took the average monthly income on the basis of the net profits for the whole year. This method would unquestionably be proper if there was no evidence from which to determine the amount of accrued income at the time when the dividends were made. But the evidence shows that on June 30, when the last dividend was made, profits had accrued to the amount of $160,166.16, and only $12,908.29 for the remainder of the year. From this counsel for plaintiff argue that there was sufficient on hand of the profits to pay this dividend. This would be correct but for the fact that a dividend of $150,000.00 had been paid on January 14 which used all of the profits up to that date and required a large amount to be charged to the surplus or invested capital. There is no evidence to show what the profits were on January 14, and they therefore have to be estimated in any event. Whether under the circumstances the profits should be averaged on the whole year, or whether in view of the fact that both of the dividends were made within the first six months, the profits of which are shown, the average of this six months should be taken, presents a difficult question. But as the amount of profits for the first six months is shown, it seems hardly equitable to use a method which would in its practical effect give the plaintiff credit on the dividends for only about half of the amount of profits which had actually come into the treasury of the company. On the whole, we think that the average for the six months should have been taken in computing the amount of profits that should be sub-

tracted from the dividends in order to determine the amount to be deducted from the capital and surplus of the previous year to ascertain the invested capital for 1917.

In this conclusion we are supported by the final opinion rendered in this case by the Committee on Appeals and Review of the Treasury Department, which opinion states in substance that if the claim of the plaintiff with reference to accrued profits is supported by the evidence, the method which we have approved should be followed. Evidently such was the practice of the Treasury Department, but for some reason not shown by the evidence it was not followed.

Making the computation with reference to the amount of accrued profits to be applied on dividends on the basis of the amount which had accrued in the first six months, and otherwise computing the tax in the manner followed by the commissioner, we find the correct amount of plaintiff's taxes for 1917 to be $70,870.90. On the original and amended returns, plaintiff had paid $67,710.99. Deducting the amount thus paid from what we find to be the correct amount of tax, we find that the additional tax due was $3,159.91. The additional tax paid and for which refund is asked was $6,128.81. Plaintiff has therefore overpaid its taxes for 1917 in the sum of $2,968.90, for which amount with interest it is entitled to judgment. It is so ordered.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

EDA MATTHIESSEN v. THE UNITED STATES [1]

[No. E-573. Decided May 6, 1929]

On the Proofs

Income tax; income from estate; payment of estate-transfer tax by executor; contribution thereto by taxpayer; deduction from gross income.—A taxpayer may not under the revenue act of 1918 deduct from income derived by him from an estate in process of administration a portion of the Federal estate tax paid by the executor, but contributed by the taxpayer in pursuance of the terms of an agreement between the executor and the taxpayer.

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[1] Certiorari denied.

The Reporter's statement of the case:

Mr. M. F. Gallagher for the plaintiff. *Messrs. E. B. Wilkinson* and *S. M. Rinaker* were on the brief.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. William T. Sabine, jr.*, was on the briefs.

The court made special findings of fact, as follows:

I. The plaintiff is and at all times herein mentioned was a citizen of the United States; the plaintiff is a resident of the city of New York, State of New York; and at the time of the payment of the income taxes by plaintiff hereinafter mentioned she was a resident of Irvington-on-Hudson, State of New York.

II. Frederick William Matthiessen, a citizen of the United States, died at La Salle, Illinois, on February 11, 1918, leaving a last will and testament which was duly filed, proved, and admitted to probate on the 21st day of March, A. D. 1918, in the Probate Court of La Salle County, State of Illinois; in said last will and testament the testator gave, devised, and bequeathed to F. W. Matthiessen, jr., Adele M. Blow, and Eda Matthiessen, plaintiff, as trustees, all of his estate, both real and personal, of every kind and description, and, after the making of certain specific bequests, provided that the trustees take charge of the real estate, pay taxes, insurance, repairs, and collect rents, issues, and profits, and at the end of one year from the probating of the will divide all the property into four equal parts, and assign such four parts severally to Eda Matthiessen, Adele M. Blow, F. W. Matthiessen, jr., and Illinois Merchants Trust Company, as trustee for Philip Matthiessen Chancellor.

III. The estate of the decedent, Frederick William Matthiessen, consisted of real estate and cash and municipal and corporate bonds, corporate stocks, and promissory notes.

IV. On March 13, 1918, before the probate of the will, the residuary legatees under said will and the executors and trustees entered into an agreement for the distribution to the residuary legatees of the personal property of the decedent. This agreement provided that the residuary legatees

should receive the assets that were to be distributed under the agreement subject to the express obligation to refund and pay over to the executors a sufficient amount to cover all estate liabilities, among which were mentioned the Federal estate tax, and the receipts given by each of the legatees provided: "I hereby agree to promptly meet any assessment called for by the executors of the estate for estate liabilities." In pursuance of this agreement there was then divided among the four residuary legatees certain cash and bonds belonging to the estate. All of the interest on the bonds so distributed was collected directly by the residuary legatees during 1919.

V. Under the aforesaid plan of distribution there were distributed and delivered to the said four residuary legatees the corporate stocks owned by the decedent at the time of his death.

VI. On March 13, 1918, there were unadjusted and unpaid obligations and liabilities of the estate of Frederick William Matthiessen, deceased, consisting of the Federal estate tax, Illinois inheritance tax, transfer and inheritance taxes of other States, debts of the decedent, expenses of administration, Illinois local taxes, and other liabilities aggregating $2,471,617.18.

VII. The executors of the said estate of Frederick William Matthiessen, deceased, on the 11th day of February, 1919, filed with the collector of internal revenue, Chicago, Illinois, a return for the estate tax on said estate showing a total tax due $1,324,483.41, and on August 6, 1919, the executors paid to the collector of internal revenue at Chicago, Illinois, the amount of said tax, namely, $1,324,483.41. The plaintiff contributed $250,720.85 in cash toward payment of said tax.

VIII. Prior to January 1, 1920, there had been no transfer by trustee's deed to plaintiff of the one-fourth share in the real estate of F. W. Matthiessen. The income from such real estate was turned over to the executors, and the accrued income from said real estate up to August 5, 1919, including $16,445.88 credited to plaintiff, was used by the executors with other funds in paying estate liabilities, including the Federal estate tax.

IX. The total gross estate of F. W. Matthiessen, sr., as reported by his executors in their return for Federal estate tax purposes was the sum of $9,450,279.75. In this valuation of the gross estate the executors included real estate as of the value of $2,394,078.37.

X. The Commissioner of Internal Revenue determined the value of the real estate within the estate of F. W. Matthiessen, sr., to be $2,462,090.12. By reason of the inclusion of the value of such real estate, the Federal estate tax assessed and collected on the estate of F. W. Matthiessen, sr., was increased by more than $300,000.

XI. On March 16, 1920, plaintiff filed with the collector of internal revenue, at Albany, New York, a return for income taxes for the year 1919, in which return the plaintiff included one-fourth of the entire income from the estate of Frederick William Matthiessen collected either by the executors or legatees. The executors of said estate of Frederick William Matthiessen, deceased, did not pay any income taxes for the year 1919, but all income was treated as paid or credited to the legatees and reported by the four residuary legatees in their individual income-tax returns whether such income was collected by them or not.

Plaintiff in computing such income taxes for the year 1919, made no deduction on account of the payment of Federal estate tax on said estate which was paid August 6, 1919, or on account of the amount which she contributed in cash toward the payment of said tax, because at the time the said return was filed and at the time of the payment of the income taxes thereon there were regulations of the Treasury Department in effect prohibiting the deduction of the Federal estate tax from income. On the face of said return of plaintiff her income tax for 1919 amounted to $78,188.27, which tax was paid by her in four installments on March 16, June 16, September 15, and December 16, 1920, to the collector of internal revenue at Albany, N. Y.

XII. On June 16, 1921, plaintiff filed a claim for refund with the collector of internal revenue, at Albany, New York, for the sum of $76,638.35, in which said claim for refund it was stated that the plaintiff had omitted to take any deduc-

tion from income for the year 1919 on account of the payment of the Federal estate tax on August 6, 1919; that the amount of said tax was $1,324.483.41 and said tax was in excess of the total income derived from the property of said estate during the year 1919, and that there was in fact and in law no taxable income of or from said estate for or during the year 1919.

XIII. An amended fiduciary return for the year 1919 was filed by the executors of said estate March 16, 1920, showing the total gross income from the property of the estate of Frederick William Matthiessen, deceased, during the year 1919, whether collected by the executors or legatees and taking as a deduction therefrom the amount of the Federal estate tax, and showing that the Federal estate tax exceeded the gross income and therefore there was no taxable income from estate property during 1919.

XIV. On or about February 10, 1922, the plaintiff filed with the collector of internal revenue, at Albany, New York, an amended return for the year 1919, eliminating from her individual return all income derived during the year 1919 from property owned by F. W. Matthiessen, sr., at the time of his death.

XV. The Commissioner of Internal Revenue duly considered the said claim for refund, and on the 25th day of November, 1924, allowed the same to the amount of $59,-656.32 and denied and rejected said claim for refund to the amount of $16,982.03. In the audit and consideration of the said claim for refund in the office of the Commissioner of Internal Revenue it was ruled and determined that the Federal estate tax was a proper deduction only from income collected by the executors from personal assets of the decedent, and it was found and determined that $16,982.03 of the income taxes paid by the claimant for the year 1919 were assessed on income received directly by claimant during 1919 from property owned by Frederick William Matthiessen at the time of his death and delivered to the claimant as one of the residuary legatees during 1918, and on income credited to claimant from her one-quarter interest in the real estate owned by Frederick William Matthiessen at the time of his

death. The Commissioner of Internal Revenue ruled and determined that the income from personal property during the year 1919, which was delivered during 1918 to the beneficiaries or legatees of the estate, represented income to the beneficiaries and not income to the estate in the process of administration, and was not subject to the deduction of the Federal estate tax; and it was further ruled and determined by the Commissioner of Internal Revenue that the income from real estate during 1919 could not be considered as income to the estate for the reason that real property passed directly to the heirs of the estate under the laws of Illinois, and such real estate income was not subject to the deduction of the Federal estate tax.

XVI. In the consideration and decision of said claim for refund the Commissioner of Internal Revenue ruled and determined that the following items of income of plaintiff for and during 1919 were received by her from property owned by Frederick William Matthiessen at the time of his death but were not subject to the deductions of the Federal estate tax, viz:

Dividends from corporate stocks owned by Frederick William Matthiessen at date of death and transferred to plaintiff as residuary legatee prior to 1919	$53, 163. 00
Interest on tax-free covenant bonds belonging to Frederick William Matthiessen at date of death and delivered to plaintiff as residuary legatee prior to 1919	7, 970. 67
Interest on bonds (not tax-free) and notes belonging to Frederick William Matthiessen at date of death and delivered to plaintiff as residuary legatee prior to 1919	2, 506. 66
Income credited to plaintiff during 1919 from her one-quarter interest in the real estate owned by Frederick William Matthiessen at date of death	16, 445. 88

XVII. The amount of $250,720.85 contributed by plaintiff in cash on August 1, 1919, for the payment of the Federal estate tax was in excess of the amount of the total income of the estate credited to or collected by her for the year 1919. The total income for the estate for the year 1919 was $828,242.85 and one-fourth of this amount was credited to or collected by plaintiff.

XVIII. The Federal estate tax of $1,324,843.41 paid on August 6, 1919, was in excess of the total combined income

during 1919 from the estate of the decedent, including the income from real estate and the personal estate remaining in the hands of the executors or delivered or passing directly to the beneficiaries, which was $828,242.85, and therefore there was no taxable income from this estate in 1919.

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

Frederick William Matthiessen, a citizen of the State of Illinois, died February 11, 1918, leaving a last will and testament by which he devised and bequeathed to his three children, F. W. Matthiessen, jr., Adele M. Blow, and plaintiff, Eda Matthiessen, as trustees, all of his estate, real and personal, and after making certain specific bequests said will provided that at the end of one year from the probation of the will the trustees should divide the estate into four equal parts to be delivered, transferred, and conveyed to each of the four children, including plaintiff, Eda Matthiessen. The three children aforesaid were named as executors of said will. The estate of the testator consisted of real estate, cash, municipal and corporate bonds, stocks, and promissory notes.

On March 13, 1918, within one month from the date of the death, and before the probate of said will, by formal agreement between the trustees, executors, and the residuary legatees of the personal property, there was divided among the four legatees certain cash and bonds belonging to the estate; and thereafter the interest on said bonds was collected directly by said legatees. A receipt was executed by each of the residuary legatees for the property so delivered, which contained the provision, "I hereby agree to promptly meet any assessment called for by the executors of the estate for estate liabilities."

On the 8th day of February, 1919, the executors of said estate filed with the collector of internal revenue at Chicago, Illinois, an estate tax return showing a total estate tax due in the sum of $1,324,483.41, which was duly paid by the executors on August 5, 1919. Of this amount plaintiff contributed the sum of $273,945.85.

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On March 15, 1920, plaintiff filed with the proper officer of the Government her income-tax return for the year 1919, showing a total income-tax liability of $76,638.35, which was duly paid in four equal quarterly installments. Thereafter, in September, 1921, plaintiff filed with the proper officer of the Government a claim for the refund of the amount so paid by her, $76,638.35, as her income tax, on the ground that she was entitled to deduct from her gross income for the year 1919 the amount contributed by her to the payment of the estate tax. Said claim for refund was rejected to the extent of the amount sued for herein, $16,138.68, on the ground that the income upon which this amount of plaintiff's tax was computed was income from property which had been transferred and delivered to plaintiff prior to 1919, under the agreement hereinabove mentioned.

The sole question to be determined, stated in simple terms, is whether or not under the revenue act of 1918 a taxpayer may deduct from income derived by him from an estate in process of administration a portion of the Federal estate tax paid by the executor, but contributed by the taxpayer in pursuance of the terms of an agreement between the executor and the taxpayer.

The estate tax is not a tax against the property of a decedent. It is an excise tax "imposed upon the transfer of the net estate of every decedent dying after the passage of this act * * *." See section 401 of the revenue act of 1918. (40 Stat. 1096.) It is provided by section 407 of said act (40 Stat. 1100), "That the *executor shall pay the tax* to the collector or deputy collector * * *." (Italics ours.) While the tax constitutes a lien against the whole property, it is due and payable *by the executor* out of any available funds, or, if there be none, by converting other property into money for that purpose. It is imposed upon the *estate* and the *executor*. *United States* v. *Woodward*, 256 U. S. 632. This case is also authority for the now well-established principle that the estate tax is a proper deduction from the gross income of "the estate in process of administration."

In this case the estate tax was actually deducted by the executors. Inasmuch as the estate tax exceeded the amount

computed as income tax for the year in question, no income tax was paid by the executors. The will provided that the executors should take care of the property, collect the rents and other income, and at the end of *one year* from the probation of the will they were directed to divide the estate into four equal parts and to deliver same to the four beneficiaries. Section 408 of the act of 1918, 40 Stat. 1100, provided that the tax should be paid *out of the estate before its distribution.* The distribution to the beneficiaries hereinabove mentioned was a premature distribution of a substantial part of the income-producing portion of the estate, and was in direct conflict with the provisions of the will and contrary to the intent and purpose of the estate-tax laws. The tax is not due until *one year* after the death of the decedent, section 406, 40 Stat. 1099, and if the parties involved in this controversy had complied with the instructions of the will, and had pursued the legal process of administration, this case would never have arisen. It is incorrect to say that plaintiff paid any part of the estate tax; she merely returned to the executors her part of the estate tax, which consisted of assets of the estate, subject to the payment of the estate tax from the moment of decedent's death. So far as the rights of the Government were concerned it was as if the property had never left the hands of the executors. Furthermore, plaintiff received the prematurely distributed assets, charged with the knowledge that she would be required to restore at least a part of it. This may be inferred from the language of the receipt itself and from the further circumstance that in her capacity as joint trustee and executor, as well as beneficiary, she is presumed to have known that the financial affairs of the estate would require a return.

It is necessary for a taxpayer claiming a deduction from income in ascertaining his tax liability to bring himself within the operation of a statute authorizing such deduction either in express terms or by the use of language which clearly imports an intention of Congress to provide for same.

Plaintiff's contention is chiefly based upon section 214 (a), subparagraph 3, of the revenue act of 1918. Subparagraph

Opinion of the Court

3 comes under the heading "deductions allowed," and so far as applicable reads as follows: "Taxes paid or accrued within the taxable year imposed (a) by the authority of the United States * * *." Clearly this provision has no application to the question involved here. Under this provision the deduction could be claimed only by the taxpayer against whom the tax was imposed. It has been seen that the *estate tax* is imposed upon the estate and the executor. It is not imposed against a distributee, nor against a distributee's share. If there was any liability upon this plaintiff to pay the estate tax, or to contribute to its payment, it was not a liability imposed "*by the authority of the United States*," but was a purely personal obligation resulting from the contract between plaintiff and the executors.

Plaintiff further contends that her claim is sustained by the provisions of section 703 of the recent revenue act of 1928, effective as of May 29, 1928.[1]

[1] (a) In determining the net income of an heir, devisee, legatee, distributee, or beneficiary (hereinafter in this section referred to as "beneficiary") or of an estate for any taxable year, under the revenue act of 1926 or any prior revenue act, the amount of estate, inheritance, legacy, or succession taxes paid or accrued within such taxable year shall be allowed as a deduction as follows:

(1) If the deduction has been claimed by the estate, but not by the beneficiary, it shall be allowed to the estate;

(2) If the deduction has been claimed by the beneficiary, but not by the estate, it shall be allowed to the beneficiary;

(3) If the deduction has been claimed by the estate and also by the beneficiary, it shall be allowed to the estate (and not to the beneficiary) if the tax was actually paid by the legal representative of the estate to the taxing authorities of the jurisdiction imposing the tax; and it shall be allowed to the beneficiary (and not to the estate) if the tax was actually paid by the beneficiary to such taxing authorities;

(4) If the deduction has not been claimed by the estate nor by the beneficiary it shall be allowed as a deduction only to the person (either the estate or the beneficiary) by whom the tax was paid to such taxing authorities, and only if a claim for refund or credit is filed within the period of limitation properly applicable thereto;

(5) Notwithstanding the provisions of paragraphs (1), (2), (3), and (4) of this subsection, if the claim of the deduction by the estate is barred by the statute of limitations, but such claim by the beneficiary is not so barred, the deduction shall be allowed to the beneficiary, and if such claim by the beneficiary is barred by the statute of limitations, but such claim by the estate is not so barred, the deduction shall be allowed to the estate.

(b) As used in this section, the term "claimed" means claimed—

(1) In the return; or

(2) In a claim in abatement filed in respect of an assessment made on or before June 2, 1924.

(c) This section shall not affect any case in which a decision of the Board of Tax Appeals or any court has been rendered prior to the enactment of this act, whether or not such decision has become final.

It is important to notice the declared purpose of Congress in enacting section 703, as set forth in the report of the Committee on Ways and Means. It reads as follows:

"Section 214 (a) (3) of the revenue act of 1926 and corresponding provisions of prior revenue acts permit a deduction from gross income in computing the net income subject to tax for taxes paid or accrued during the taxable year. *Obviously this provision applies only to taxes imposed upon the taxpayer* and does not permit the deduction of taxes paid by a volunteer. Extraordinary difficulty has been encountered in applying this deduction in the case of estate, inheritance, legacy, and succession taxes imposed by a State, Territory, or a foreign country. These taxes are usually paid by the executor of the estate. *Under the regulations* of the department the deduction was allowed *the estate* in computing its income tax if the tax was considered as an *estate tax* and was allowed as a *deduction to the beneficiary* if the tax was considered to be an *inheritance, legacy,* or *succession* tax. As a result of recent Supreme Court decisions (*Keith* v. *Johnson* and *United States* v. *Mitchell*), redeterminations of the deductions claimed by the estate by the beneficiary will be necessary unless the situation is remedied by retroactive legislation. Consequently your committee deems it advisable to insert section 703 in the bill, the general effect of which will be to ratify what the taxpayers have done and to prescribe specific rules for future action." (Our italics.)

In the case of *Keith* v. *Johnson*, 271 U. S. 1, referred to in the above report, the administratrix paid to the State of New York the State "transfer tax." When she made the Federal income-tax return she did not deduct the transfer tax paid, but followed the Treasury regulations then in force and paid the income tax shown in the return. In an action later brought, in which she claimed the right to deduct said State tax, the court held that the transfer tax paid to the State was deductible from the income of the estate in ascertaining the taxable income received by her as administratrix in that year. In the case of *United States* v. *Mitchell*, 271 U. S. 9, referred to in said report, it was held that the *inheritance tax* imposed by the State of Texas and paid by the executors was deductible in computing the Federal income tax of the estate. It was on account of the decisions in these two cases, which announced a ruling contrary to the existing regulations, that Congress deemed

Syllabus

it advisable to enact section 703, the general effect of which was, as stated in the report, "to *ratify what the taxpayers have done* and to prescribe specific rules for future action." The rule declared in these two cases is now a well-established principle of the estate tax law.

The total amount of income from the estate of decedent, including the income from real estate and the personal estate remaining in the hands of the executors, or delivered to the beneficiaries, or passing directly to them, was $828,242.85. The estate paid no income tax by reason of the deduction of the estate tax from the gross income. If plaintiff's theory is correct, and the beneficiaries should be entitled to deduct from gross income the amount of said estate tax, it would inevitably result in a loss to the Government of a substantial amount of revenue to which it is clearly entitled under the law.

We find no authority in law for the deduction claimed by plaintiff, and the petition will be dismissed.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

H. L. HORD v. THE UNITED STATES

[No. H-100. Decided May 6, 1929]

On the Proofs

Jurisdiction; tariff and prohibition acts; seizure and sale of automobile.—Both the national prohibition act and the tariff act, in the matter of sales and forfeitures of property seized, provide the detailed procedure and a specified forum for determining questions arising out of the sale and for the protection of those claiming an interest, and where the mortgagee of an automobile seized for violation of both acts, and sold under the tariff act, neglects to pursue the remedies available under either or both acts, suit may not be maintained in the Court of Claims to recover the unpaid balance of the purchase money.

Reporter's Statement of the Case

The Reporter's statement of the case:

Mr. Marvin Farrington for the plaintiff.

Mr. Heber H. Rice, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, H. L. Hord, is a citizen of the United States, residing at Marfa, Presidio County, Texas.

II. The plaintiff is engaged in the business of selling automobiles. His place of business is located at Marfa, Presidio County, Texas.

III. On February 18, 1925, plaintiff sold to "Jimmie" Stovall one special six Studebaker touring automobile, serial number 3083942, engine EL number 78059, for the sum of $1,125, of which amount $425 was paid in cash and the remainder, $700, was in deferred payments as follows: $100 to be paid March 1, 1925, and $50 on the first day of each month thereafter until the balance was paid in full.

IV. On February 24, 1925, there was filed and recorded in the office of the county clerk, Presidio County, Texas, a chattel mortgage executed and delivered by "Jimmie" Stovall, also known and signed as J. V. Stovall, by plaintiff to secure unpaid purchase money in the sum of $700 on the purchase of said automobile.

V. The Government was informed that the aforesaid Stovall and one J. A. Pust had gone to the Rio Grande River for a load of "liquor." Thereupon a warrant was issued on December 23, 1925, to the United States marshal and his deputies for their apprehension to answer a complaint of T. C. Taylor, who was a mounted inspector of customs, of violation, on or about December 21, 1925, of section 3 of the national prohibition act and section 593 of the tariff act of 1922.

On December 24, 1925, the said Stovall and Pust were seen driving an automobile from the direction of the Mexican border, and were stopped and taken into custody by the arresting officers. The automobile, Studebaker special six touring, serial No. 3083942, engine EL No. 78059, was

searched by them and found to contain a cargo of untaxed distilled spirits. Both automobile and cargo were seized by the said officers and held for the action of the United States authorities. The warrant was returned by the marshal, per his deputy, N. F. Work, showing execution of same by the arrest of the two men December 24, 1925, at the county jail. Into whose custody the arresting officers thereafter delivered the automobile does not appear.

VI. On December 31, 1925, plaintiff's attorneys, namely, Mead & Metcalf, located in Marfa, Texas, addressed a letter to the office of the U. S. collector of district No. 24, located at El Paso, Texas, requesting two blank bonds to secure the court cost of the seized automobile, above described, as provided for in section 608 of the tariff act of 1922. These blank bonds were forwarded by the U. S. collector and received by the plaintiff's attorneys.

VII. T. C. Taylor, U. S. mounted inspector, on September 18, 1926, signed the following statement, which is identified as plaintiff's Exhibit A:

"I, T. C. Taylor, mounted inspector of customs, stationed at Marfa, Texas, hereby certify that some time during the month of January, 1926, I have no record to show the exact date, received from H. L. Hord, of Marfa, Texas, a cost bond prepared in duplicate on forms furnished by the Treasury Department in the sum of $250 prepared under the custom laws in which the said H. L. Hord claims an interest in a certain secondhand Studebaker automobile which I had theretofore seized in connection with the arrest of Jimmie Stovall and J. A. Pust, who were charged with a violation of the Volstead law and also a violation of the tariff act; that the bond referred to above was approved by me and mailed to the collector of customs at El Paso, Texas; that afterwards the said automobile was advertised and sold as confiscated property under the tariff act; that I never received any instructions not to sell said automobile and I do not know what became of the bond referred to above after I mailed it to the collector of customs.

"I further certify that my investigation of the claim made by the said H. L. Hord at the time convinced me that he held a bona fide mortgage against the automobile in question for the amount claimed by him; that he knew nothing about the illegal use of said automobile by the said Jimmie Stovall and J. A. Pust and was not guilty of any conduct

Reporter's Statement of the Case

which would forfeit his right to claim a preference lien for the amount of his mortgage and that I so informed the assistant U. S. district attorneys at El Paso who were representing the Government in the proceedings herein mentioned."

VIII. The U. S. collector of customs located at El Paso, Texas, received the following letter under date of November 23, 1926, from T. C. Taylor, U. S. mounted inspector in charge at Marfa, Texas, which is identified as defendant's Exhibit No. 7.

"Referring to a bond furnished by Mr. H. L. Hord, of Marfa, Texas, in January, 1926, the only bond I saw was a bond furnished by that man and I made a notation on the bond presented by Mr. Hord that the sureties were worth the amount it prescribed in the bond.

"My records do not show a copy of a letter of transmittal of this bond to the collector of customs. A statement signed by me was prepared by Mead & Metcalf, and I did not fully understand the significance of the contents and knew that I did not have the authority to approve a bond of this character, as it was a matter for the collector's office only."

IX. There is no satisfactory evidence to show that the bonds were approved by the collector of customs at El Paso, Texas, as provided for in tariff act, section 608, or ever received at the office of the U. S. collector located at El Paso, Texas.

X. A hearing was held at Marfa, Texas, on August 31, 1928, subsequent to the signing of Exhibit A as set forth in Finding VII, at which time Mounted Inspector T. C. Taylor stated that he did not recall having the surety bond in his possession other than to approve the solvency of the sureties of the bond, which approval was marked on the back of said bond.

XI. The sale of the automobile was advertised for three consecutive weeks as provided for in the tariff act, section 607, in the New Era, a weekly newspaper published at Marfa, Texas, the home town of the plaintiff.

On April 3, 1926, a public sale was held in Marfa, Presidio County, Texas, at which time a Studebaker Special Six touring automobile, Serial No. 3083942, engine EL #78059,

was sold to the plaintiff for the sum of $485, which amount was paid to the U. S. collector.

XII. The mortgagee's application for remission was filed November 12, 1926, subsequent to the expiration of the period provided by section 613 of the act of September 21, 1922, 42 Stat. 858, 986, for remission of forefeitures.

XIII. The amount of this claim by plaintiff is $193.77, being the balance due on his mortgage at the time the above-described automobile was seized.

XIV. On January 13, 1926, the United States attorney filed an information against the said "Jimmie" Stovall in the United States District Court for the Western District of Texas charging him in the first count with having in his possession, on or about December 21, 1925, for beverage purposes, intoxicating liquor, and in the second count with transporting on the same date for beverage purposes intoxicating liquors, contrary to statute. Upon his arraignment January 16, 1926, the defendant pleaded guilty to both counts and was fined $25.00, which he paid January 18, 1926, and was thereupon released. The order and sentence of the court required the destruction of the intoxicating beverages and contained no reference to or order respecting the vehicle in which the said beverages had been transported, nor has there been introduced any evidence of an order of court relating to said vehicle.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

Under what theory the plaintiff concluded that this court had jurisdiction in this case does not clearly appear. It will be necessary to recite some of the facts.

In a county in the State of Texas one Jimmie Stovall and J. A. Pust were discovered in possession of an automobile, a search of which developed that it contained a large quantity of distilled spirits, and they were arrested and the spirits seized. The search was made by deputy marshals, and the warrant under which they were held recites a violation of both the national prohibition act and the tariff act.

Opinion of the Court

It appears that they were transporting the spirits, and also that they were in possession of untaxed spirits. This being true, proceedings under section 607 of the tariff act, 42 Stat. 985, would have been legal, and no proceedings to sell had been taken under the national prohibition act. See *United States* v. *One Ford Coupe*, 272 U. S. 321. If their possession was in transportation, then the proceedings would be under section 26 of the national prohibition act, which is applicable " only to a person discovered in the act of transporting intoxicating liquor in violation of law." *United States* v. *One Ford Coupe, supra.* The automobile was seized, and held by the United States marshal. On the 31st of December, 1925, the plaintiff requested the collector for that district to send him blank bonds to be used in proceedings under section 608 of the tariff act, 42 Stat. 985, which the collector did. Thereafter, a grand jury having refused to indict under the warrant of arrest, the district attorney filed an information apparently under both the tariff and the national prohibition acts. One part of it alleges unlawful possession of distilled spirits, and another part alleges unlawful transportation of the spirits. Under this information, on arraignment the said Jimmie Stovall in open court pleaded guilty as charged, and on January 16, 1926, was fined $25.00, which was paid on January 18, and he was thereupon released from imprisonment. The distilled spirits were ordered " reconfiscated and destroyed." The district attorney took no steps towards condemnation of the automobile and here the proceedings in court ended. This failure to proceed to a condemnation was at the time known to plaintiff.

Thereafter, apparently early in March, 1926, the collector of internal revenue advertised the automobile for sale under section 608 of the tariff act, 42 Stat. 985. The plaintiff, apparently familiar with the provisions of this act, prepared the said bond previously sent him at his request, in the sum of $250.00, with sureties, and claims to have delivered it to the inspector before whom he claims to have qualified the sureties. It does not satisfactorily appear that he did either. The act required qualifications for sureties before the col-

lector and gave no authority to the inspector to accept qualifications. What became of the bond does not appear, except that it never reached the collector. Had it reached the collector, under the statute, it would have been his duty, after satisfying himself as to the sureties, "to have transmitted the claim and the bond with a duplicate list and description of the articles seized to the United States district attorney," whose duty it would have been, as required by statute, to have proceeded to a condemnation of the property; and in these proceedings the plaintiff could have intervened and could have had his claim passed upon. It does not appear that plaintiff made any effort before the sale to ascertain whether his bond had been received by the collector, and on the day of sale plaintiff appeared and bid for and became the purchaser of the automobile, and, without protest, paid the sale price to the collector.

It will be seen that if he had been diligent and had seen that his bond was filed with the collector, the statute provided a procedure and a forum for a hearing in court on the merits of his claim. He did not do this, and the collector had no authority to pay him out of the purchase money or to pass upon the legality of his claim, and did what the law required when he transmitted the fund to the Secretary of the Treasury. The plaintiff still had a remedy and three months from date of sale (section 613, 42 Stat. 986) within which to assert it, namely, to petition the Secretary of the Treasury for a remission of the forfeiture so far as his claim was concerned upon presenting satisfactory evidence of the justice of his claim. He waited for more than six months before presenting his claim, and after his day in court had passed. The Secretary replied to his claim that he had no authority to give him any relief after the expiration of the said three months, at the end of which time he was required after settlement of costs and other things to turn the balance of the fund into the Treasury.

It will also be seen that under the provisions of the national prohibition act, 42 Stat. 315, 316, in the information proceeding by the district attorney the plaintiff might

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have insisted upon the district attorney taking the condemnation proceedings required by that act, and could have intervened and had the validity of his claim passed upon. He did not do this. Why the district attorney did not proceed to a condemnation of the car after the conviction of Jimmie Stovall does not appear. It is very evident that the plaintiff is in his present plight by reason of his own negligence and inattention to his interests in the matter of filing a bond and in the matter of seeking relief before the Secretary of the Treasury provided he had a just claim, and it might well be held that having acquiesced in the proceedings under the sale and purchased the automobile, he would be estopped from questioning its legality. If it was an illegal sale he acquired no title to the automobile purchased and his action, if for recovery of the money paid, would be against the collector.

But however this may be, both the national prohibition act and the tariff act, in the matter of sales and forfeitures of property seized, provide the detailed procedure and a specified forum for determining questions arising out of the sale and for the protection of those claiming an interest. And while we are disposed to the opinion that the sale under section 607 of the tariff act by the collector was valid, as the facts show possession of untaxed spirits, still it is unnecessary to pass upon this question. Under either of the acts he had a remedy and forum, and it was there that he should have sought the needed relief. The said proceedings under the tariff act were "judicial proceedings." *United States* v. *One Ford Coupe*, *supra*, p. 329. It is not the province of this court to pass upon or consider the regularity or validity of the proceedings under either of those acts. It clearly has no jurisdiction to determine this case. *King* v. *United States*, 64 C. Cls. 325; *United States Bedding Co.* v. *United States*, 55 C. Cls. 459; *Philadelphia Boiler Works* v. *United States*, decided by this court March 18, 1929 [*ante*, p. 311]; *Cheatham et al.* v. *United States*, 92 U. S. 85, 88; *Snyder* v. *Marks*, 109 U. S. 189, 193, and cases cited; see also *Medbury case*, 173 U. S. 492, 498; *Shook, Administratrix*, v. *United States*, 61 C. Cls. 816, 820;

Wilder Manufacturing Co. v. *Corn Products Co.*, 236 U. S. 165, 174, 175; and *United States* v. *Babcock*, 250 U. S. 328, 331, and cases cited.

The petition should be dismissed, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

TIDEWATER COAL EXCHANGE, INC., IN DISSOLUTION, BY CHARLES A. OWEN, HOWARD ADAMS AND JAMES E. MANTER, RECEIVERS, v. THE UNITED STATES

[No. H-185. Decided May 6, 1929]

On the Proofs

Implied contract; use of coal exchange facilities; executed contract.—Where the Government availed itself of the facilities of a coal exchange at tidewater, without becoming a member thereof, and for a time made payment of demurrage to the exchange in accordance with the terms of membership, but refused to make further payments, and the use of the facilities was of benefit to the Government, and the exchange fully executed its part of the arrangement, there arose an implied contract to pay the exchange what the services were reasonably worth.

Same; organization without capital or profit; proof as to advancement of demurrage.—Where in the circumstances recited the exchange was a mutual organization without capital stock or accumulated profits, and could not discharge its obligations to the carriers for the demurrage until collection was made thereof from its members, the absence of proof of payment of the demurrage to the carriers by the exchange does not preclude a judgment against the United States.

The Reporter's statement of the case:

Mr. Horace S. Whitman for the plaintiff. *Mr. Gibbs L. Baker* was on the briefs.

Mr. George Dyson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The Tidewater Coal Exchange, Inc., was incorporated under the laws of the State of Delaware on April 12, 1920, and was in existence from said date until on or about the 23d day of September, 1921, at which time it was dissolved. Since the day and date of its dissolution it has been, and now continues to be, a body corporate for the purposes, among other things, of prosecuting and defending suits by or against it.

On the 30th day of September, 1921, the chancellor of the said State of Delaware, sitting in and for New Castle in said State, upon application appointed Charles A. Owen, Howard Adams, and James E. Manter receivers of the Tidewater Coal Exchange, Inc., in dissolution. Immediately thereafter the said Charles A. Owen, Howard Adams, and James E. Manter made and filed their official bond as such receivers and fully qualified as such receivers pursuant to the order of appointment and entered upon their official duties, and still continue as receivers of the Tidewater Coal Exchange, Inc. Said receivers were by the order of their appointment authorized and empowered to take charge of the estate and effects of the Tidewater Coal Exchange, Inc., to collect the debts and property due and belonging to said corporation, to prosecute and defend, in the name of said corporation, all such suits as were necessary or proper for the purposes aforesaid, and to do all other acts which might be done by said corporation, if in being, that were or may be necessary for the final settlement of the unfinished business of said corporation.

II. The object and purpose of the Tidewater Coal Exchange, Inc., were to expedite the release of cars and the loading of vessels with bituminous coal at tidewater points in order to increase the supply of cars and the movement of coal. It was not organized for profit and was without capital stock.

The members of the Tidewater Coal Exchange, Inc., consisted of the persons named as incorporators and such other persons as from time to time became members. The board of directors of said corporation was authorized to make

and alter rules and regulations relating to and governing the conduct of the operations and the use of the facilities and properties of the corporation. Pursuant to the powers vested in it the board of directors promulgated certain rules and regulations for the government of the business of the corporation.

Rules 6, 10, 15, and 18 of the corporation are as follows:

CLASSIFICATION

6. All bituminous coal for transshipment at tidewater ports shall be graded and classified in designated pools by a classification committee appointed by and under the direction of the executive committee.

The principles of classification shall be just, uniform, and nondiscriminatory, and it is to be the purpose to improve the classification of coals at all times, and matters of dissatisfaction with classification may be appealed to the executive committee.

SHIPPING INSTRUCTIONS

10. Shipping instructions shall give the exchange as the consignee; shall show the proper pool number, as per classification sheets, and for whose account shipped. Example: "Tidewater Coal Exchange, Inc., Pool 25, account of John Doe Coal Company." All coal consigned to tidewater points for reshipment by members of the exchange must be consigned to the exchange in the manner indicated above.

FREIGHT AND DEMURRAGE CHARGES

15. Members shall sign an agreement on Exchange Form "C" to the effect that they will be responsible for, and pay to the carriers all freight charges (when waybilled collect) and vessel loading charges, and pay to the exchange the assigned proportion of any demurrage charges for their account; this agreement reading as follows:

"I (or we) hereby agree to pay to * * * Railroad all freight charges, when waybilled collect, and loading charges and to pay the Tidewater Coal Exchange, Inc., car demur-

rage charges assigned against me (or us) by authority of the commissioner of the Tidewater Coal Exchange, Inc., on coal shipments to the piers for my (or our) account at any tidewater port under the Tidewater Coal Exchange, Inc., agreement."

Executed agreement on Form "C" shall be filed with the proper office of each interested railroad and with the Tidewater Coal Exchange, Inc.

DEMURRAGE BILLS

18. Each carrier will submit a statement to the exchange at the close of each calendar month for each port or pier, as required by its tariffs, itemized to show dates of arrival and release of cars, covering total demurrage accruing against the exchange during the month. The exchange will compile car or tonnage days detention accounts against each member, and apportion to each member having car or tonnage days detention during the calendar month in which the demurrage accrued his proportion on the basis of his car or tonnage days detention at each port or pier, as compared to the total car or tonnage days detention at the same port or pier, and render bills to individual members in accordance therewith, collecting and remitting to the carrier within thirty (30) days from presentation of carrier's statement.

The aforesaid rules and regulations were in force and effect and the United States had full knowledge thereof during the times of all of the acts and occurrences hereinafter set forth.

The Tidewater Coal Exchange, Inc., was known and designated in commercial circles as the "Exchange," and is hereinafter referred to in these findings as the "Exchange."

III. All coal shipped to tidewater points from the various mines was consigned to the exchange by its members and classified by the exchange into pools. The pool consisted merely of a segregation of all coal of that class in cars in the railroad yards. When coal consigned to the exchange arrived at tidewater it was placed by the railroads in the pool into which such coal had been classified by the exchange. When coal was withdrawn from such a pool by a

member, through the exchange, the railroad dumped the number of tons ordered to be withdrawn for the member's account from the particular pool specified in the order, without respect to the identity of the coal or the cars that had been consigned to the exchange for the account of such member. This procedure expedited the delivery of the coal. By this practice the car supply for the transshipment of coal was increased, and the proportion of the total railroad demurrage bill allotted by the exchange to the various members was less than the actual demurrage on the coal would have been if the coal had been handled otherwise than through the exchange.

IV. The exchange was liable to the carriers for all demurrage charges accruing on coal consigned to the exchange, and it gave the railroads involved corporate bonds conditioned upon the payment of said demurrage charges to the railroads. The Tidewater Coal Exchange, Inc., or its sureties, have paid the railroad a substantial part of the demurrage charges hereinafter referred to, and the Tidewater Coal Exchange, Inc., and its sureties, are obligated to pay the balance thereof, and claims have been filed with the receivers by the various railroad and bonding companies for the amounts unpaid.

V. No formal contract was entered into beween the United States Government and the Tidewater Coal Exchange, Inc. Neither the Government of the United States nor any of the departments thereof was at any time a member of the Tidewater Coal Exchange, Inc., but the United States Government departments made use of the facilities and rights of the exchange and received the benefits and privileges of the exchange the same as the members thereof, notwithstanding the absence of a formal contract required of members.

The business between the Government departments and the exchange was transacted on the same basis as the business with the members was transacted.

Under date of December 9, 1920, the Tidewater Coal Exchange, Inc., sent the following letter to Captain H. B. Knoles, transportation division, Quartermaster Corps, United States Army, Washington, D. C.:

TIDEWATER COAL EXCHANGE, INC.,
CENTRAL SQUARE BUILDING, NEW YORK CITY,
New York City, December 9, 1920.

Captain H. B. KNOLES,
Transportation Division,
Quartermaster General, U. S. Army,
Washington, D. C.

DEAR SIR: Referring to conversation with you a day or two ago, relative to failure on the part of the zone supply officer at New York to settle railroad demurrage bills accruing against his account at this port.

Beg to inclose herewith copies of the bills rendered for which no payment has been received, so that you may understand the matter clearly. I will advise that on coal handled through the exchange there is but one bill rendered by the railroad company to the exchange, which bill is apportioned between its members on the basis of the percentage of the actual detention created by such member of the whole detention. In this manner the individual demurrage charge against any one member is greatly reduced by reason of the fact that coal loses its identity when pooled and moves more rapidly than it would on individual consignment.

It so happens that there has been quite a good deal of detention on the zone supply officers' account at this port, due, I think, to the fact that there was considerable delay in unloading barges in New England points during a portion of this period.

Would also say that the Government departments are courtesy members, bearing no apportionment of the expenses of the exchange, but, of course, paying their portion of the demurrage, as outlined above.

With this information in hand, I will be glad if you will give these bills prompt attention, as some of them are of long standing and much overdue. The exchange has advanced this money for your account to the railroad company and should be reimbursed.

Yours very truly,
(Sgd.) J. W. HOWE, *Commissioner.*

The United States departments continued to make use of the facilities, rights, benefits, and privileges of the Tidewater Coal Exchange, Inc., and up to and during part of the month of October, 1921, the United States departments continued to have coal consigned to the exchange. During all of the times that the departments of the United States made use of the facilities of the exchange the United States was

advised and had knowledge of the rules of the exchange, and of the purposes for which the exchange was organized and operated, and of its method of conducting its business.

VI. Subsequent to December 9, 1920, the United States purchased coal from time to time and consigned it, or had it consigned, to the exchange in accordance with the rules and regulations of the exchange, and received all of the benefits, privileges, and advantages from the use of the exchange. Upon arrival of the coal consigned to the exchange at the point of destination the railroad notified the exchange thereof, and the exchange sent each member, and also the United States, for whose account the coal was consigned, a statement showing the arrival of the coal and the total debit or credit of such member in the pool into which the coal had been classified. A like statement was sent each member involved, and also the United States, upon the withdrawal of coal or transfer of a debit or credit of coal in any pool to another member of the exchange. At the end of each month a statement was sent by the exchange to the various members, and also to the United States, showing the total number of tons of coal in the various pools of the exchange each day throughout the month consigned to such member, also to the United States. This was done in order that from these statements the members could check up their tonnage days' detention—that is, the total number of tons held in the exchange each day through the month—as the apportionment of the total railroad demurrage bill was based upon the total net tonnage days' detention shown on monthly statement.

VII. The railroads operating the coal piers at tidewater ports to which coal was consigned to the exchange for the account of its members, and also to the United States, rendered a separate bill for each pier at the end of the month against the exchange for accrued demurrage on all cars consigned to the exchange for account of its members, and the United States. The exchange immediately checked this bill against its records and apportioned the total of such bill against its members, and the United States, who had accrued net tonnage days' detention on their credits,

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in such proportion to the whole bill as the total net tonnage days' detention of each member at the particular pier bore to the total net tonnage days' detention of all members for the particular month at such pier, and rendered all members, and also the United States, a bill for the apportioned amount of the total railroad bill. The United States War Department upon receipt of such bills for its apportionment of demurrage, from August, 1920, to July, 1921, paid the exchange the amounts so billed, amounting in all to $94,617.40.

VIII. Subsequent to May 1, 1921, the exchange, in accordance with its established practice, compiled and apportioned the monthly railroad bills for demurrage to those having coal in the exchange, including the United States, during the month, and rendered bills to the United States for its proportion of the same. The bills rendered the zone supply officer of the United States War Department at Brooklyn, N. Y., were as follows:

Bill rendered	Month	Pier	Amount
June 17, 1921	May, 1921	South Amboy	$4,091.02
Aug. 12, 1921	July, 1921	do	3,358.10
Sept. 27, 1921	August, 1921	do	1,112.69
Aug. 15, 1921	July, 1921	Pt. Reading	17,273.10
June 27, 1921	May, 1921	Arlington	1,212.66
Sept. 7, 1921	June, 1921	do	423.91
Aug. 17, 1921	do	do	8,019.92
Aug. 3, 1921	July, 1921	do	2,247.23
July 15, 1921	May, 1921	Pier 18, Jersey City	1,007.23
Aug. 4, 1921	June, 1921	do	2,146.89
Aug. 22, 1921	July, 1921	Pt. Liberty	4,866.18
June 25, 1921	May, 1921	Elizabethport	722.00
Aug. 24, 1921	June, 1921	do	527.01
Sept. 1, 1921	July, 1921	do	6,697.06
Sept. 23, 1921	August, 1921	do	2,859.28
Dec. 15, 1921	October, 1921	Pt. Reading	55.62
			56,619.90

Included in this amount is a Federal tax of 3% amounting to $1,649.12. The amount of the tax collected by the Tidewater Coal Exchange, Inc., on the sums paid it by the Government, as shown by Finding VII, was $2,755.85. No part of the sum of $56,619.90, the same being the amount of the bills rendered the zone supply officer of the United States War Department at Brooklyn, N. Y., has been paid

by the United States, and the United States has not paid any of the railroads any demurrage accrued on said coal.

IX. Under the rules and regulations of the exchange, the exchange was authorized to allow members of the exchange to draw from the various pools more coal than for which they held credits, the overdrafts being from the coal of other members. The United States availed itself of this privilege to overdraw from time to time. Overdrafts of coal were to be made good upon the demand of the exchange. When the exchange ceased to do business on September 30, 1921, the United States was a debtor in some pools and a creditor in others. In the pools in which the United States held credits the defendant's coal had been withdrawn by other members on overdrafts that were not made good. The United States has not made good its overdrafts of other members' coal. On September 30, 1921, the defendant had overdrawn its credits in the pools 567.91 tons of coal, and the defendant had credits for 3,479.03 tons of coal in other pools.

The market value on September 30, 1921, of the 567.91 tons of coal overdrawn by the defendant was $3,142.18, and the market value on September 30, 1921, of the coal for which the defendant held credits was $18,985.96, or a difference of $15,843.78 between the values of the debits and credits in coal.

The court decided that plaintiffs were entitled to recover $36,371.15.

BOOTH, *Chief Justice*, delivered the opinion of the court:

This suit arises out of the following state of facts: The plaintiffs are the receivers of the Tidewater Coal Exchange, a corporation organized under the laws of Delaware for the purpose of facilitating the dispatch of cargoes of coal at tidewater points. The corporation was a mutual one not organized for corporate profit. Coal of various consignors was, under the rules of membership in the corporation, consigned to the corporation and by it designated to certain pools in accord with its classification. As needed it was withdrawn from the pool and the consignor credited with

the shipment. Demurrage charges of course accumulated, as the cars stood for some time without unloading, and this charge was apportioned among the consignors upon a percentage basis each month, i. e., each shipper was charged with his portion thereof upon the basis of the ratio of individual consignments to the total sum accumulated for the period. No objection is interposed as to the fairness of the rules; and it is conceded that as a result thereof the shipper paid less than would have been required in direct dealings with the railroad. The whole arrangement was in effect the injection of a mutual intermediary, organized to deal with the entire transaction as a unit, and thereby facilitate the release of cars to the railroad and supply the demand for coal. The assessment and payment of demurrage in this way does not run counter to the carriers' tariff filed with the Interstate Commerce Commission. *Emmons Coal Mining Co.* v. *Norfolk & Western R. R. Co.*, 272 U. S. 709; *Smokeless Fuel Co.* v. *C. & O. Ry. Co.*, 142 Va. 355.

The Government, while not a subscribed member of the exchange, did over a considerable portion of time utilize the same. Coal was purchased by the United States and consigned to the exchange; all its rules and regulations were applied to the same, statements of accounts were regularly mailed to the Government, settlement was made in accord therewith, and at least $94,617.40 was paid by the Government to the exchange for its facilities. At the time of the dissolution of the corporation there was an outstanding indebtedness due from the Government of $56,619.90 demurrage charges, and this suit is to recover the same.

The defendant, aside from the counterclaim to be discussed later, questions the right of recovery upon several grounds. It is said that the liability for demurrage obtains between the shipper and the railroads and that the latter have not assigned their claim to the plaintiff. We think the *Emmons Coal Co. case*, *supra*, answers the contention. It is of course manifest that the exchange did not transport any coal of the defendant from mines to tidewater. The exchange was not incorporated for such a purpose, its facilities were engaged at tidewater, and assuredly there was no

legal impediment in the way of the defendant's engaging the same if deemed advantageous.

The authority of an officer of a government to contract on its behalf is a vital essential; the rule is firmly established, and if the case is dependent upon a contract in this sense, as well as section 3744, Revised Statutes, compelling the same to be in writing, the defense in this respect advanced in the defendant's brief is invulnerable. What is here involved is not an executory but an executed contract, i. e., the defendant has received the full benefit of all the advantages and savings access to the exchange affords, and refused to pay in full for what said services are reasonably worth. It is neither asserted nor contended that the defendant accepted the service as gratuitous, or under circumstances justifying such an inference, for payment was made without question over a long period of time. Starting with the case of *Clark* v. *United States*, 95 U. S. 539, and consistently followed since, this court and the Supreme Court have adhered to the rule that a parole contract fully executed by the contractor upon his part, wherein the United States receives all the benefits of the undertaking, imposes a liability upon the latter as upon an implied contract. *St. Louis Hay & Grain Co.* v. *United States*, 191 U. S. 159; *United States* v. *Bethlehem Steel Co.*, 258 U. S. 321; *Andrews case*, 41 C. Cls. 48; *Moran Bros.* v. *United States*, 39 C. Cls. 486.

There is nothing in the record disclosing an absence of authority to deal with the exchange; on the contrary, the findings show that what all the officers did with respect thereto, except the last payments here involved, was fully concurred in by the defendant. Payments were made in due course, upon the authority of the officers incurring the expense.

A more difficult issue than the above is involved in the admitted fact that the full amount of demurrage claimed is not proven to have been paid the railroads by the exchange. What portion of the total sum claimed is shown by proof of "a substantial sum," and this is indefinite. The

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exchange, as the findings show, was liable to the railroads and entered into bond to pay demurrage charges. The railroads dealt directly with the exchange, rendered their bills of account to the exchange, and they have now on file with the receivers for the exchange claims for the amounts due. No claim has ever been preferred against the Government by the roads for the demurrage charges, and obviously the exchange, being a mutual organization without capital stock or accumulated profits, may only discharge its obligations by the collection of indebtedness due to it as such. The railroads may not sue the Government, and the receivers for the exchange may not liquidate the debt of same until they recover the money. Therefore, we are of the opinion that where the Government dealt with the exchange, received and accepted its benefits in every particular, liability to pay follows; and inasmuch as the railroads did likewise and no cause of action upon their part obtains, except against the receivers, a judgment against the Government follows. This we think is apparent in view of the statute of limitations; the railroads could not now sue as the statute is jurisdictional in this court.

The counterclaim of the defendant is sustainable. The exchange at the time it went into the hands of the receivers was indebted to the Government in the sum of $15,843.78 for coal shipments consigned to the exchange, which were subsequently sold by the latter, and the proceeds therefrom withheld from the Government. Clearly this reduces the exchange's claim herein by this amount. In addition to this, the exchange has included in its claim a demand for a 3% Federal tax amounting to $1,649.12. The Government is not liable for the tax, so this amount will be deducted, as well as $2,755.85 paid the railroads heretofore as a Federal tax, thereby reducing the judgment to $36,371.15. Judgment for $36,371.15 is awarded the plaintiffs. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

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UTAH POWER & LIGHT CO. v. THE UNITED STATES

[No. J-670. Decided May 6, 1929]

On Demurrer to Petition

Refunds to Forest Service depositors; jurisdiction; finality of Secretary's findings.—Under the act of March 4, 1907, providing for refunds to depositors of amounts paid in "for the use of any land or resources of the national forest in excess of amounts found actually due from them to the United States," the jurisdiction of the Secretary of Agriculture is exclusive only as to disputed questions of fact, and his decision upon a question of law is reviewable by the court.

Same; statute of limitations.—Application for a refund of deposit made "for the use of any land or resources of the national forest," and action thereon by the Secretary of Agriculture, are conditions precedent to the applicant's right to sue the United States, and the statute of limitations, section 156 of the Judicial Code, where the refund is denied by the Secretary, runs from the date of denial.

The Reporter's statement of the case:

Messrs. John E. Hoover and *H. H. Clarke*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer. *Mr. R. W. Williams* was on the brief.

Mr. Francis W. Clements, opposed. *Messrs. Alexander T. Vogelsang* and *Lawrence H. Cake* were on the brief.

The opinion states the material averments of the petition.

SINNOTT, *Judge*, delivered the opinion of the court:

This matter comes before us on demurrer to the petition, on the ground, first, that it does not state a cause of action within the jurisdiction of the Court of Claims, and second, that all sums paid prior to December 5, 1922, are barred by the statute of limitations.

Plaintiff seeks to recover $14,995 paid for rentals of land situated within a national forest, all of which said sum, with the exception of $1,845, was paid to defendant prior to the calendar year 1923.

It is alleged in paragraph 2 of the petition:

"2. Prior to May 14, 1896, the plaintiff's predecessor in interest, Big Cottonwood Power Company, a corporation of the State of Utah, constructed in Big Cottonwood Canyon, Salt Lake County, Utah, certain works for the generation of electric power, including a power house, machinery, penstock, a diversion dam, reservoir, pipe lines, and transmission lines, the said works being known as the Granite Plant. The power house and machinery and part of the penstock were constructed on privately owned land. The dam, reservoir, and waterway were constructed on public land owned by the United States."

In paragraph 4 of the petition it is alleged that in 1912 the Forest Service, contending that in so far as said works were on public lands owned by the United States, the power companies (the predecessors of the plaintiff in the present case) were trespassers on the public domain, caused proceedings to be begun in the United States District Court for Utah to enjoin the maintenance and operation of such works; that in the District Court a decree was entered for the United States June 29, 1914, but that on appeal to the Circuit Court of Appeals said decree was reversed, the Circuit Court of Appeals holding that under sections 2339–2340 Revised Statutes the power companies had acquired vested rights of way over the public lands for such reservoirs, canals, and ditches, and for dams, flumes, pipes, and tunnels of like equivalent character and uses, which were constructed and practically completed prior to May 14, 1896. The significance of date May 14, 1896, is that the act of Congress of that date (29 Stat. 120) terminated the system of vested easements over the public lands and substituted revocable permits therefor. *Utah Light & Traction Co.* v. *United States*, 230 Fed. 343.

In paragraph 5 it is alleged that on December 5, 1925, a final decree and on April 3, 1926, an amended final decree was entered in the District Court, and that in such amended final decree the plaintiff's predecessor was adjudged to have "a right of way for a diverting dam, reservoir, and flume, and waterway, for use in the operation and maintenance of defendant's so-called granite plant, in, upon, over, and across

the land of the United States, to wit:" (Here follows a description of the land.)

In paragraph 6 it is alleged that before the entry of final decree in the district court—that is, in 1917—the plaintiff as the owner or lessee of a number of hydroelectric plants, including the granite plant above-mentioned, paid, upon demand, to the United States the sum of $39,201, on account of rental for the use of the public lands, accrued to July 30, 1917, including the sum of $10,075 for the granite plant, and that

"such sum, to wit, $10,075, was paid by the plaintiff to the United States through the Forest Service as rental for a right of way for its dams, reservoirs, flumes, and waterways in connection with its granite plant."

It is also alleged in said paragraph 6 that thereafter, from 1918 to 1925, the plaintiff paid annually the sum of $615 as rental for said rights of way on account of the granite plant, the total amount so paid aggregating $4,920.

In paragraphs 10 and 11 it is alleged that plaintiff presented to the Secretary of Agriculture a claim (attached to the petition as Exhibit 6) for the refund and repayment of the sum of $14,995 paid as aforesaid, basing its claim for refund upon the act of March 4, 1907 (c. 2907, 34 Stat. 1270), and the denial thereof by the Secretary of Agriculture.

It appears from the allegations in the petition, which of course are admitted for the purpose of the demurrer, that the granite plant was constructed prior to May 14, 1896, and that plaintiff secured a final adjudication in 1925; that its predecessors had

"a right of way for a diverting dam, reservoir, and flume, and waterway for use in the operation and maintenance of the so-called granite plant; and that it made total payments upon demand of defendant in the sum of $14,995 from 1917 to 1925 as rental for a right of way for its dam, reservoir, flumes, and waterway, in connection with its granite plan. This state of facts admitted on demurrer would relieve plaintiff from making said payment of $14,995, which sum was in excess of amounts due the United States.

It thus appears from the allegations in the petition that out of the sum of $39,201 paid on account of rentals for the use of public lands, accrued to July 30, 1917, as set forth

in paragraph 6 of the petition, the sum of $10,075 was erroneously paid and thereafter $4,920 was erroneously paid to defendant. The demurrer challenges the sufficiency of the act of March 4, 1907 (34 Stat. 1270), to sustain this case in the Court of Claims, as well as the sufficiency of the petition. The pertinent provisions of said act are as follows:

"That all money received after July first, nineteen hundred and seven, by or on account of the Forest Service for timber, or from any other source of forest-reservation revenue, shall be covered into the Treasury of the United States as a miscellaneous receipt, and there is hereby appropriated and made available as the Secretary of Agriculture may direct, out of any funds in the Treasury not otherwise appropriated, so much as may be necessary to make refunds to depositors of money heretofore or hereafter deposited by them to secure the purchase price on the sale of any products or for the use of any land or resources of the national forest in excess of amounts found actually due from them to the United States."

It is contended by defendant that the above act

"places its administration within the jurisdiction of the Secretary of Agriculture, both as to determining the fact issues involved and making the refunds in those cases where he shall find as a fact that the payment has been made in excess of the amounts found by him to have been actually due to the United States for the uses specified."

Defendant's contentions, we think, are answered in the case of *United States* v. *Laughlin*, 249 U. S. 440, involving the act of March 26, 1908 (35 Stat. 48), section 2 of which reads as follows:

"That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives."

It will be seen that this act is very similar to the act of March 4, 1907, *supra*. In the *Laughlin case* the Supreme Court said:

"In our view it was the intent of Congress that the Secretary should have exclusive jurisdiction only to deter-

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mine disputed questions of fact, and that, as in other administrative matters, his decision upon questions of law should be reviewable by the courts. In the case before us the facts were not and are not in dispute and were shown to the Secretary's satisfaction; whether, as matter of law, they made a case of excess payment, entitling claimant to repayment under the Act of 1908, was a matter properly within the jurisdiction of the Court of Claims."

It is proper to observe that the act of March 4, 1907, *supra*, is a remedial act and should be liberally construed; out of the sum of $39,201 and the additional sum of $4,920 paid, as alleged in paragraph 6 of the petition, it appears from the allegations in the petition that the sum of $14,995 was in excess of the amount due the United States and is therefore within the purview of said act of March 4, 1907.

It remains to be seen whether all payments made prior to December 5, 1922, are barred by the statute of limitations. Under the act of March 4, 1907, *supra*, the plaintiff had a right to apply to the Secretary of Agriculture for a refund of excess payments at any time after payment. There is no limitation fixed therein as to the time of such application. Such application and action thereon by the Secretary, we think, was a condition precedent to plaintiff's right to sue in this court, and the statute does not begin to run until the rejection of the application.

Plaintiff's application for a refund was denied by the Secretary of Agriculture on October 19, 1928. In the case of *King* v. *United States*, 48 C. Cls. 371, involving the act of March 26, 1908, above quoted, it was held that the Court of Claims has no jurisdiction of a claim for repayment until the claim has been presented to the Secretary of the Interior and rejected.

In *Maginnis* v. *United States*, 52 C. Cls. 271, 277, it was held, with reference to section 2 of the act of March 26, 1908 (35 Stat. 48), providing for refund of excess payments under the public land laws " where it shall appear to the satisfaction of the Secretary of the Interior " that such payments were made, that the matter must in the first instance be determined by the Secretary, but if the application is denied through error or failure on the part of the Secretary to

act, the applicant may assert his right in the Court of Claims, under our general jurisdiction.

The point we wish to emphasize in the *Maginnis case* is that the application must first be determined by the Secretary, and it is not until he decides the matter that the statute of limitations begins to run.

Defendant's demurrer should be overruled. It is so ordered.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

NATIONAL CHEMICAL MANUFACTURING CO., BY J. W. PAUL, TRUSTEE, v. THE UNITED STATES

[No. F-335. Decided May 6, 1929]

On the Proofs

Income and profits taxes; termination of business; loss of good will occasioned thereby.—Where a manufacturing company is compelled to discontinue business solely because a formula used by it becomes valueless, the good will that ceases is ended by the termination of the business. The loss sustained is on the business as an entirety and the good will, which "is not susceptible of being disposed of independently," can not be evaluated for the purpose of deducting it as a loss in the company's income and profits tax return.

The Reporter's statement of the case:

Mr. Ben Jenkins for the plaintiff. *Wallick & Shorb* were on the brief.

Mr. Daniel A. Taylor, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The National Chemical Manufacturing Company, for which suit is brought by J. W. Paul, trustee, was incorporated about May 1, 1915, and purchased all the assets of the National Chemical Manufacturing Company, a partnership, including good will and a certain formula for an antifreezing mixture used in the manufacture of nitrotoluol and known as N. T. The assets purchased by the corporation

from the partnership were paid for by stock issued by the corporation in the amount of $84,000, and of this stock $14,000 par value was issued for the formula. The value of said formula was carried on the books of the corporation at $14,000 and good will at $25,381.10. Some of the stock issued by the corporation was sold at par to acquaintances of the stockholders, but it was not offered for sale on the open market, and the amount sold does not appear from the evidence.

The partnership had been in operation for a period of about seven months before the sale of its assets to the corporation, and its books for that period showed a net profit of $14,675.25 on an average capital in tangible assets of $37,281.28. The partnership had been engaged in manufacturing the said mixture known as N. T. The World War stopped this business while the war continued, and during the war other formulas for making N. T. were discovered.

II. The National Chemical Manufacturing Company, shortly after its incorporation, began the manufacture of trinitrotoluol, a high explosive commonly known as T. N. T., and continued the manufacture thereof until the end of the World War when, there being no further demand for T. N. T., the corporation made inquiries as to the demand for N. T. and found that the demand for this product had also ceased except at prices that would not leave any profit to the corporation. As a result of this condition the formula had become worthless, the machinery which had been used in the corporation's factory had no value except as scrap, and the business of the corporation was entirely lost. The corporation discontinued business on December 5, 1918, and surrendered its charter. Its affairs have since been and are now administered by J. W. Paul, trustee.

III. The National Chemical Company, on April 15, 1919, filed its corporation income and profits tax return for the year 1918, showing a tax liability of $2,942.13, which was paid. In this return a deduction of $14,000.00 was taken for abandonment of the processes for the manufacture of N. T. and a deduction of $25,381.10 was taken for the loss of good will. The tax officials disallowed these two deduc-

tions, and about January 30, 1923, the Commissioner of Internal Revenue notified the National Chemical Company that its taxable income for the year 1918 had been increased to $62,126.31, and an additional tax had been assessed for 1918 in the amount of $38,417.95, which sum was paid by the said corporation.

IV. On July 7, 1923, the National Chemical Company filed a claim for refund which included the said additional tax of $38,417.95 so paid for the taxable year 1918. On July 11, 1923, a certificate of overassessment was made, but this overassessment was based upon grounds other than the alleged loss on processes and formula and value of good will, as to which a refund was denied.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The National Chemical Manufacturing Company was incorporated about May 1, 1915, and purchased all of the assets of the National Chemical Manufacturing Company, a partnership, including good will and a certain formula for an antifreezing mixture used in the manufacture of nitrotoluol and known as N. T. The World War having created a demand for trinitrotoluol, a high explosive commonly known as T. N. T., the company shortly after its incorporation ceased manufacturing N. T. and began the manufacture of T. N. T. which it continued until the end of the World War. The cessation of hostilities ended for the time being the demand for T. N. T. During the war new processes and formulas had been developed for the manufacture of N. T., and the corporation found that there was no demand for this product except at prices lower than what it would cost to manufacture it. As a result of these conditions arising during the war the formula became worthless and the machinery which had been used in the factory of the corporation had no value except as scrap, and its business was entirely lost. The corporation was dissolved, and its affairs went into the hands of the trustee who has commenced this action.

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In 1919 the said corporation filed its income and profits tax return for the year 1918, in which it sought to be allowed a deduction for loss of the value of the formula and for loss of good will. The tax officials disallowed these two deductions and the commissioner notified the corporation that by reason thereof an additional tax had been assessed for 1918 in the amount of $38,417.95, which sum was paid by it. Having filed a claim for refund, the trustee for the corporation now seeks to recover the amount of this additional tax so paid.

In order to establish a deductible loss the original value of the asset upon which the loss is alleged to have been sustained must be shown. There is no doubt that the formula became worthless, but there is no satisfactory evidence either as to its cost or as to its value. Stock to the amount of $14,000.00 par value in the corporation was issued in payment for the formula, but this does not show that the formula was worth $14,000.00. It merely shows that those who owned it considered the stock of equal value, and there is no satisfactory evidence as to the value of the stock. Some of the stock was sold for its par value to "acquaintances," but how much is not shown, and under these circumstances we do not think this is evidence that the stock was worth its par value.

It is also urged that the showing with reference to profits made by the partnership, the assets of which were purchased by the corporation, is sufficient to establish the value of the formula and good will. If it be conceded that the value of the intangibles can be proved in this manner, the evidence offered would nevertheless be immaterial in this case for the reason that it applies to a period when a different product was being manufactured. The partnership had been manufacturing N. T. The corporation ceased manufacturing N. T. and commenced manufacturing T. N. T. during the years following the time when it bought the partnership's assets. The profits during this period are not shown, nor would the amount thereof be material if shown, because they were made on the manufacture of T. N. T. and not through the manufacture of N. T., in relation to which it is alleged the loss occurred. If we concede for the sake of

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the argument that the evidence with relation to profits tends to show the value of the formula and good will, it would be the joint value thereof, and not the value of either separately.

Besides this, if the value of the formula is shown at all, it was its value in 1915 at the time the purchase was made. It must be borne in mind in this connection that the claim for loss presented by the plaintiff is, as stated in plaintiff's brief, "predicated upon the provisions of section 234 (a) (4) of the revenue act of 1918, not upon those of section 234 (a) (7)." Such being the case, it must be shown that the loss was one which was "sustained during the taxable year," that is, during 1918. In other words, the loss is not claimed under the depreciation and obsolescence section but because, as stated in plaintiff's brief, "the processes and formulas for the making of the antifreezing mixture, and the good will, were abandoned because they had become valueless."

It may be conceded that the processes and formula had become valueless and for that reason they were abandoned by the corporation, but this does not show that they became valueless "in the taxable year" as required by the statute. On the contrary, the evidence shows that during the war other formulas for making N. T. had been discovered. The particular time of this discovery does not appear, but there is nothing in the testimony to indicate that it was in 1918. It is quite clear that the evidence does not show the amount of any deductible loss in the taxable year. It only shows that during the years which had intervened since the time the formula was purchased it had become worthless.

The evidence is also insufficient to establish a deductible loss with reference to the good will. The value of the good will as carried on the books of the corporation was ascertained by taking the book value of the tangible assets together with the $14,000.00 worth of stock issued for the formula, and ascertaining the difference between that and the $84,000.00 par value of the stock issued. The amount of profits made by the partnership is claimed to show the value of the good will in the same manner as was argued with reference to the value of the formula, and there are

the same reasons for rejecting this evidence as insufficient to prove the value of good will. Profits shown in 1915 are not proof of the value of good will in 1918, when the profit made in 1915 is upon a certain article and thereafter the business is engaged in manufacturing another and different commodity. Moreover, the proof, if it could be called such, relates to the value of both the formula and the good will taken together and not to either separately. How much of the profit resulted from the use of the formula and how much from good will can not be determined. This, however, is not the only difficulty in proving the amount of loss sustained in reference to good will and perhaps not the principal reason why the evidence on this point must be held wholly insufficient.

Good will is the favor which the management of a business wins from the public. The loss in this case was occasioned by the fact that the company, being no longer able to manufacture N. T. at a profit, decided to abandon the business. Whether a loss occasioned in this way could be considered a loss of good will might well be questioned, but in any event the loss which the plaintiff seeks to have allowed is entirely separate from the business itself. In the case of *Red Wing Malting Co.* v. *Willcuts*, 15 Fed. (2d) 626, it was held that "good will has no existence separate and apart from an established business"; and also that "with the termination of that business it is ended." In this holding we concur. It is true that the business was ended, and that any good will which the corporation possessed was lost, but the loss was on the business as an entirety, including all of the assets which the corporation held. The Supreme Court said in *Metropolitan Bank* v. *St. Louis Dispatch Co.*, 149 U. S. 436, 446, that "good will * * * is not susceptible of being disposed of independently." Whether, when the business was closed out and the assets sold, the receipts of such sale might be used as forming a basis for the computation of a deductible loss is not before us.

The commissioner was correct in refusing deductions on account of the alleged loss with reference to processes and formula and good will.

It follows that plaintiff's petition must be dismissed, and it is so ordered.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

MARTHA A. GUETTEL AND ARTHUR GUETTEL, INDIVIDUALLY, AND MARTHA A. GUETTEL AND HENRY A. AUERBACH, TRUSTEES FOR EDWARD GUETTEL UNDER THE WILL OF HENRY A. GUETTEL, DECEASED, v. THE UNITED STATES

[No. H-210. Decided May 6, 1929]

On the Proofs

Estate-transfer tax; insurance payable to estate; assignment of policy; inclusion of proceeds in gross estate.—The tax imposed by the final clause of section 402 (f) of the revenue act of 1918 on life insurance policies payable in terms to beneficiaries "other than the decedent or his estate" is not a direct tax on property. *Chase National Bank case*, 278 U. S. 327. But where the decedent assigned a policy on his life for value received the proceeds thereof are not to be included in the gross estate.

Statutory construction; taxing statutes.—Taxing statutes may not be extended by implication beyond the clear import of the language used.

The Reporter's statement of the case:

Mr. L. L. Hamby for the plaintiffs.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Henry A. Guettel, the above-named decedent, died testate August 19, 1921, a citizen of the United States and a resident of the State of Missouri. Henry A. Auerbach and Mary A. Guettel were duly appointed and qualified as executors under the will of said decedent, but have since been discharged as such executors.

II. The plaintiffs are citizens of the United States and residents of the State of Missouri and are the residuary legatees under the will of said decedent.

III. On August 16, 1922, the said executors duly made and filed their estate-tax return on Form 706 for the estate of said Henry A. Guettel, deceased, under the provisions of Title IV of the revenue act of 1918. This return showed a gross estate of $1,040,528.17, deductions of $174,346.73, a net estate of $866,181.44, and a tax of $40,794.52. On August 16, 1922, said tax was paid by said executors to the collector of internal revenue for the sixth district of Missouri.

IV. Upon review and audit of said return the Commissioner of Internal Revenue determined the gross estate to be $1,291,263.40, the deductions $158,355.24, the net estate $1,132,908.16, the total tax $64,790.81, and the additional tax due and unpaid $23,996.29. The determination of the Commissioner of Internal Revenue was set out in a letter to said executors, dated October 6, 1923.

V. Upon a second consideration of said return the Commissioner of Internal Revenue determined the gross estate to be $1,267,911.24, the deductions $175,438.51, the net estate $1,092,472.73, the total tax $60,747.27, and the additional tax due and unpaid $19,952.75. The determination of the Commissioner of Internal Revenue was set out in a letter to said executors dated October 7, 1924.

VI. Upon a third consideration of said return the Commissioner of Internal Revenue determined the gross estate to be $1,162,711.92, the deductions $175,438.51, the net estate $987,273.41, the total tax $50,481.87, and the additional tax due and unpaid $9,687.35. The determination of the Commissioner of Internal Revenue was set out in a letter to said executors dated February 10, 1926.

VII. Upon a fourth consideration of said return the Commissioner of Internal Revenue determined the gross estate to be $1,162,711.92, the deductions $191,824.98, the net estate $970,886.94, the total tax $49,170.96, and the additional tax $8,376.44. The determination of the Commissioner of Internal Revenue was set out in a letter to said executors dated October 11, 1926.

VIII. On February 26, 1926, said executors paid to said collector the sum of $11,908.20 (being a tax of $9,687.35 and interest of $2,220.85), which included said additional tax of $8,376.44, with interest thereon, at the rate of 10% per annum for a period of two years and 107 days, amounting to $1,920.84, or a total payment on account of said additional tax of $10,297.28. On March 3, 1927, the United States refunded to said executors on account of said tax the principal sum of $1,610.92, with $64.68 interest.

IX. On January 14, 1920, the New York Life Insurance Company issued upon the life of the decedent, Henry A. Guettel, three policies of insurance described as follows:

(E) Policy No. 6638322, for $50,000 payable to the estate of the decedent, the proceeds of which amounted to $50,-378.50 upon the death of the insured.

(F) Policy No. 6638324, for $50,000 payable to the estate of the decedent, the proceeds of which amounted to $50,-152.50 upon the death of the insured.

(G) Policy No. 6638184, for $100,000 payable to the estate of the decedent, the proceeds of which amounted to $100,815.00 upon the death of the insured.

X. On March 25, 1920, the decedent, Henry A. Guettel, assigned said policy No. 6638184 to his wife, Martha A. Guettel, to whom was paid said sum of $100,815.00 upon the death of the insured.

XI. In determining the tax against the estate of said Henry A. Guettel, deceased, the Commissioner of Internal Revenue included in the gross estate the sum of $100,531.00, received by the estate under said policies numbered 6638322 and 6638324, and the further sum of $60,815.00, being the proceeds of said policy No. 6638184 less the sum of $40,000.00.

Through the inclusion of said insurance proceeds, amounting to $161,346.00, the total tax on said estate amounted to $49,170.96. If said proceeds were excluded, the total tax would amount to $36,263.28, making a difference of $12,-907.68, without interest.

XII. On March 18, 1926, said executors filed with said collector a claim for the refund of $11,812.74, or such

greater amount as might be legally refundable, based on the ground that the proceeds of the insurance policies described in Finding IX were improperly included in the gross estate. On October 11, 1926, the Commissioner of Internal Revenue rejected said claim for refund by letter of said date.

The court decided that plaintiffs were entitled to recover $4,865.20, tax paid due to inclusion of the proceeds of $60,815 in the gross estate (Finding XI) and interest thereon of $1,115.66 paid to the collector (Finding VIII), a total of $5,980.86, with interest thereon from February 26, 1926.

Moss, *Judge*, delivered the opinion of the court:

On January 14, 1920, the New York Life Insurance Company issued three policies of insurance on the life of Henry A. Guettel, who died testate in August, 1921, each of said policies payable to the estate of decedent. On March 25, 1920, said decedent assigned one of said policies to his wife, and there was paid to her upon the death of the insured the proceeds of same, $100,815. In determining the amount of the estate tax due from decedent's estate the commissioner included in the gross estate the proceeds of the three policies, less the deduction provided for in section 402, subsection (f) of the revenue act of 1918, 40 Stat. 1096, the pertinent provisions of which read as follows:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *.

"(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

Plaintiffs' chief contention is that the statute fixing the measure of the tax, in so far as it includes the proceeds of the insurance policies, is unconstitutional. That question was involved in the case of the *Chase National Bank of the City of New York* v. *United States*, decided January 2, 1929,

after the preparation of the briefs in the instant case. That case went to the Supreme Court of the United States on certified questions of law concerning which instructions were requested for the proper disposition of the case. The facts as certified, and as briefly set out in the opinion, are as follows:

"On September 13, 1922, after the effective date of the revenue act of 1921, Herbert W. Brown procured three insurance policies on his life aggregating $200,000, each naming his wife as beneficiary. Each policy reserved to the insured the right to change the beneficiary. All premiums on the policies were paid by the insured. On April 10, 1924, he died testate, leaving the plaintiff below his executor and an estate subject to the estate tax imposed by the revenue act of 1921, c. 136, 42 Stat. 227. The tax as assessed by the commissioner included $9,146.76 imposed by reason of the inclusion in the estate of the proceeds of the three insurance policies, less $40,000 exemption authorized by the statute. The executor paid the tax and upon denial of a claim for refund brought the present suit in the Court of Claims to recover the tax as illegally assessed."

The questions certified were stated as follows:

"Question I: Whether the tax imposed by the final clause of section 402 (f), revenue act of 1921, 42 Stat. 278, on life insurance policies payable in terms to beneficiaries 'other than the decedent or his estate' is a direct tax on property and void because not apportioned.

"Question II: Whether the $9,146.76 tax imposed bears such an unreasonable relation to the subject matter of the tax as to render it void."

Both questions were answered in the negative.

Defendant contends that the decision in the *Chase National Bank case*, 278 U. S. 327, is controlling as to each of the three policies involved herein. We are in agreement with the defendant's contention as to the two policies payable to the estate of Henry A. Guettel, and hold that the value of said two policies was properly included in the decedent's gross estate under the authority of that case. We must, however, disagree with defendant's contention as to the policy payable to decedent's estate and thereafter assigned by plaintiff to his wife. It was an absolute and

Syllabus

unconditional assignment of the policy "for value received," and the insurance company paid to the assignee at the death of the insured the full proceeds of the policy, $100,815. By this assignment the insured was divested of all right and title to the policy, and all beneficial interest therein passed to the assignee. After the assignment the insured was without authority to change the beneficiary or to exercise any control whatever over said policy during the existence of the assignment. See 37 Corpus Juris (sec. 146), 2 p. 435, and cases cited thereunder.

The language, "*all other beneficiaries*," used in the statute, can not be fairly construed as applying to the *assignee* of a policy payable to a designated beneficiary. Such a construction would be an unwarranted extension of the meaning of the statute here involved. Taxing statutes may not be extended by implication beyond the clear import of the language used. *Gould* v. *Gould*, 245 U. S. 151, *United States* v. *Merriam*, 263 U. S. 179.

We have reached the conclusion that the policy assigned to decedent's wife was improperly included in decedent's gross estate. Plaintiff is entitled to judgment as provided in the conclusion of law herein.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

YALE & TOWNE MANUFACTURING CO. v. THE UNITED STATES

[No. F-257. Decided May 6, 1929]

On the Proofs

Contracts; executed; supplemental contract; attempt to increase Government's liability.—Where an order has been given by a duly authorized officer for the manufacture and supply of designated articles, and the order is received and the articles manufactured and supplied without objection to the price named, a contract has been created fixing the Government's liability, which can not thereafter be increased by supplemental contract.

Reporter's Statement of the Case

Jurisdiction; set-off against judgment; suit to enforce judgment; counterclaim.—Where a judgment for taxes has been rendered against the United States and appropriated for by Congress, and the Comptroller General sets off against the amount thereof supposed liquidated damages growing out of a contract, suit to enforce payment of the judgment in its entirety does not lie in the Court of Claims, and a counterclaim therewith can not be considered.

The Reporter's statement of the case:

Messrs. Louis H. Porter and *F. Carroll Taylor* for the plaintiff.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is, and at all the times hereinafter mentioned was, a Connecticut corporation engaged in the business of manufacturing locks, hardware, and other products at Stamford, Connecticut.

II. On the 13th day of November, 1924, the Commissioner of Internal Revenue duly allowed to plaintiff the sum of $1,363.45 refund of income and excess-profits taxes for the year 1917 and certified the same for payment to the General Accounting Office.

III. Under date of January 20, 1926, the General Accounting Office sent to plaintiff a notice of settlement of said allowance by the issuance of two warrants, one in favor of the plaintiff for $7.95 and the other in favor of the Treasurer of the United States for $1,355.50, the latter amount to be used as a set-off claimed by the United States on account of an alleged overpayment to plaintiff under a purchase order dated June 22, 1918, for 250 control handles.

IV. Plaintiff refused to accept said payment and duly returned said warrant for $7.95 to the General Accounting Office.

V. Early in 1918 plaintiff and the United States were negotiating a contract for the manufacture by plaintiff of 4,500 control handles for bomb release mechanism.

VI. While said negotiations were pending the United States found it necessary to have 250 of such handles in a "very great hurry."

VII. On June 12, 1918, the Office of the Chief of Ordnance of the War Department wrote plaintiff that it was instructed to order 250 control handles, to be ready for delivery on or before July 1, 1918, at a price to be the same as that contained in the pending contract for 4,500 handles, or

"In the event that a contract for 4,500 release mechanisms Mark V is not awarded to you, then in that event you will be paid cost plus ten per cent * * * said price in no event to exceed $9.75 per unit."

VIII. On June 18th, 1918, plaintiff was urged by a telephone call from the Ordnance Office to go ahead with the order.

IX. On June 20, 1918, the Office of the Chief of Ordnance wrote plaintiff that it had directed a procurement order in said terms to be sent to it.

X. Plaintiff started at once to manufacture the control handles. As the items were wanted in an unusual hurry plaintiff worked on them days, nights, and Sundays without the advantage of dies which would have been considered necessary for production on a quantity basis. Said items were completed and ready for delivery by July 1st.

XI. Certain variations from the drawings were authorized by the Ordnance Department during the course of such manufacture.

XII. On June 27, 1918, plaintiff sent a telegram to the Ordnance Department, as follows:

"Two hundred fifty special control handles for release mechanism will be finished July 1st as per promise. Wire shipping instruction."

XIII. On or about July 12th, 1918, a procurement order for said control handles, entitled War–Ord–P–10506–2092–TW, dated June 22, 1918, and signed by Samuel McRoberts, colonel, Ordnance Department, by R. P. Lamont, lieut. col., Ordnance Department, was mailed to plaintiff by the Ordnance Department, in which the price was given as follows:

"You will be paid f. o. b. your works, Stamford, Connecticut, the actual cost of the control handles herein

ordered, determined in accordance with the 'definition of cost pertaining to contracts,' issued by the Office of the Chief of Ordnance, War Department, June 27, 1917, plus a profit of ten (10) per cent, but in no event shall the cost plus profit exceed nine dollars and seventy-five cents ($9.75) per unit."

The order also contained the following clause:

"If you accept this order, kindly wire this office and endorse and return the enclosed copy in the manner indicated thereon."

The said procurement order is attached to counterclaim, marked "Exhibit A," and is made a part hereof by reference.

XIV. The said order was received by plaintiff about July 26, 1918, and on the same day was returned unsigned to the Procurement Division with the following statement:

"In order not to hold up in any way and to meet the emergency presented by you we went into this without consideration of cost, having no idea what this would be, and accepted your order without question. We feel it is just, however, that you pay us for these at the actual cost plus 10%. We are returning herewith procurement order which we received by mail this morning and respectfully request that you revise this as above."

XV. Shortly thereafter and some time prior to September 26, 1918, the accountant in charge at Bridgeport district ordnance office went to the plaintiff's factory and ascertained the cost of manufacturing the handles plus ten per cent to be $3,793.00.

XVI. After investigation by the officials of the Ordnance Department and in February, 1919, the Ordnance Department sent plaintiff a procurement order for said control handles, giving the price as $3,739.00, and paid plaintiff $3,793.00. Plaintiff on February 6th, 1919, returned said procurement order, drawing attention to the typographical error in the amount given in the procurement order.

On February 12, 1919, Captain E. B. Cooper, presuming to act on behalf of the Ordnance Department, mailed to plaintiff the following paper, which was dated back to June 22, 1918:

Reporter's Statement of the Case

PROCUREMENT ORDER

War—Ord. P10506-2092 Tw., including 1st and 2d amendments to negotiations

June 22, 1918

Contractor: Yale & Towne Manufacturing Company, Stamford, Connecticut

To the above-named contractor:

The United States of America, acting through the undersigned under direction of the Chief of Ordnance, hereby requests you to furnish the following-named articles, upon the terms and conditions set forth herein and upon the "Additional terms and conditions" annexed hereto and made a part hereof.

Article: Two hundred and fifty (250) control handles for release mechanism, Mark VII-B.

Price: Three thousand seven hundred ninety three dollars ($3,793) (which is the actual cost as audited by the accounting branch, Administrative Division) plus ten per cent (10%) f. o. b. your works Stamford, Connecticut.

It is expressly understood and agreed that this order shall be effective only to the extent that funds appropriated by Congress for the purpose of this order are available and have been allotted.

Delivery: Immediately.

Drawings: [Here follows description of drawings.]

Specifications: Ordnance Office specifications for "Control handles for bomb release mechanism, Mark VII-B, EW 606-0," dated May 10, 1918.

Inspection: By Inspection Division of the Ordnance Department. All articles subject to rejection for failure to pass inspection.

Acceptance: If you accept this order, please so advise this office and endorse and return the enclosed copy in the manner thereon indicated. This order, together with your acceptance, will constitute the contract. No formal contract is necessary.

Shipping instructions: Will be furnished you by the Ordnance Department.

Communications: Should be addressed to the contract section, Administrative Division, Ordnance Department, and marked with the above War-Ord. Number.

UNITED STATES OF AMERICA,
By E. B. COOPER,
Capt., Ord. Dept. U. S. A.

XVII. Plaintiff on November 3, 1924, had obtained a judgment against the United States in this court for $2,787.33 for the recovery of stamp taxes illegally collected from it. Payment of said judgment was certified for payment in the second deficiency act for the fiscal year 1925, approved March 4, 1925.

On the 20th of January, 1926, the General Accounting Office sent a notice of settlement of said judgment to plaintiff and drew two warrants in payment thereof, one in favor of plaintiff for $71.62, and the other in favor of the United States for $2,715.71, of which $2,648.74 was claimed as due for liquidated damages under said curb bit contract and the balance for other minor adjustments. The plaintiff refused to accept said warrant for $71.62 in payment of its said judgment and returned same to the General Accounting Office.

The court decided that plaintiff was entitled to recover, in part.

GRAHAM, *Judge*, delivered the opinion of the court:

In connection with the adjustment of its revenue taxes the Commissioner of Internal Revenue on November 13, 1924, allowed the plaintiff the sum of $1,363.45 refund of income and excess-profits taxes for the year 1917, and certified the same for payment to the General Accounting Office. On January 20, 1926, that office sent plaintiff notice of settlement of said allowance by the issuance of two warrants, one in favor of the plaintiff for $7.95 and the other in favor of the Treasurer of the United States for $1,355.50, the latter amount to be used as a payment claimed by the United States on account of an alleged overpayment to the plaintiff under a purchase order dated June 22, 1918, for 250 control handles.

The plaintiff refused to accept said settlement and returned the warrant to the General Accounting Office.

Thus are involved the settlement by the General Accounting Office and the validity of the counterclaim set up by that office and deducted from the allowance, namely, $1,355.50. The court has jurisdiction to enforce the allowance of the refund as a claim arising under a law of Con-

gress. *Kaufman* v. *United States*, 11 C. Cls. 659, 96 U. S. 567, 569.

The plaintiff was negotiating with the Ordnance Department to furnish it 4,500 control handles for bomb-release mechanism. Pending these negotiations a representative of the War Department on June 12, 1918, wrote plaintiff requesting the delivery of 250 of said handles by July 1st, and notified plaintiff that it would be paid for the same the cost of production plus 10 per cent profit, the price, i. e., cost and profit, in no event to exceed $9.75 per unit.

The plaintiff without protest or objection proceeded immediately to fill the order and completed the handles ready for delivery by July 1 and delivered them. On June 22, 1918, a more formal order was issued conforming to the first order as to the number of handles to be supplied, the percentage of profit, and the limit of $9.75 per unit price, which included cost-plus profit.

Thereafter, on July 26, 1918, the plaintiff for the first time complained that the maximum price fixed in the order was not satisfactory and asked for a revision of the price. In September, 1918, an accountant of the ordnance office at Bridgeport visited plaintiff's factory, made an examination and reported that the cost of manufacturing the handles, plus 10% profit, was $1,355.50 more than the maximum price fixed in the orders. The matter seems to have dragged along until finally on February 12, 1919, Captain E. B. Cooper, of the Ordnance Department, undertook to change the price fixed in the letter of June 12 and the order of June 22, and issued a new order, dating it back to June 22, 1918, revising the price and fixing the sum of $3,793.00 reported by the auditor as the proper price to be paid, whereas under the order the price would have been $2,437.50; and thereupon plaintiff was paid $3,793.00. This the Government is here contending was an overpayment to the plaintiff of $1,355.50, upon the ground that the original order and its fulfillment without objection or protest was an acceptance of the order, and a contract; that the plaintiff was entitled to be paid only under that contract the price therein named, and that Captain Cooper had no authority to change that contract and

increase the consideration. It does not appear from the findings that he had any authority from anyone to take any steps in connection with the contract, much less to set it aside and make a new one.

Under the facts found it must be held that the giving of the order by the proper officer, the receipt of it, and the manufacture and supply of the articles ordered, without complaint or objection as to the price named, created a contract. See *Nelson Co. case*, 56 C. Cls. 448, 261 U. S. 17, 23, 24; *Willard, Sutherland & Co.* v. *United States*, 56 C. Cls. 413, 262 U. S. 489, 494; *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, 78, 79; and *Atwater & Company* v. *United States*, 65 C. Cls. 621, 643, 644.

The alteration in the contract made by Captain Cooper was without authority and not binding. It was an attempt to create a legal liability upon the part of the Government, which he had no authority to create in view of the fact that the Government's liability was fixed by the original contract. *Phoenix Horseshoe Co.* v. *United States*, 59 C. Cls. 234, 245; and *Wilcox* v. *United States*, 56 C. Cls. 224, 235.

Another claim has been suggested in this case. In a tax suit for refund by the plaintiff, this court on November 3, 1924, rendered a judgment in favor of plaintiff for $2,787.33. It was a final judgment and no appeal was taken within the prescribed time. It was certified to the Treasurer of the United States and by him transmitted to Congress with other claims for appropriation for payment, and was certified for payment by Congress in the second deficiency act for the fiscal year 1925, approved March 4, 1925. On January 20, 1926, the General Accounting Office sent notice to the plaintiff of the settlement of said judgment, in which settlement two warrants were issued, one in favor of the plaintiff for $71.62 and one in favor of the Treasurer of the United States for $2,715.71. The latter warrant was based upon a claim apparently of record in the General Accounting Office, which grew out of a contract between plaintiff and the Government, in which plaintiff furnished the Government certain materials and was paid the contract price. Thereafter it was claimed by the Accounting Office that

Syllabus

plaintiff had delayed in completing its contract, and was liable for liquidated damages in the sum of $2,648.74, for the payment of which the judgment given him by this court was reduced by that amount and a warrant issued in favor of the Treasurer of the United States.

This claim by the General Accounting Office for liquidated damages had not been adjudicated and was disputed. The judgment of this court of November 3, 1924, was a final judgment, unappealed from, properly certified to the Treasurer, by him certified to Congress, and by Congress recognized, and an appropriation made for its payment. It is clear that the General Accounting Office acted illegally in refusing to pay the judgment. And while we would be disposed from the present record to hold that the claim for liquidated damages was not a valid claim, it is nevertheless evident that the plaintiff's forum for relief is not this court but some other court where the payment of judgment can be enforced. As the court can not consider the claim, it can not pass upon the counterclaim. *Baltimore & Ohio R. R.* v. *United States*, 34 C. Cls. 484, 502.

But, aside from this, the petition, while reciting the facts as to this judgment and counterclaim, prays for no relief from the action there taken, and only prays for judgment for $1,363.45, the amount of the said tax refund.

Judgment should be entered for plaintiff under the first claim in the sum of $7.95, with interest at 6 per cent per annum from January 20, 1926, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

J. LIVINGSTON & CO. v. THE UNITED STATES

[No. H-342. Decided May 6, 1929]

On the Proofs

Income and profits taxes; determination of salary deductions.—Where there is no evidence in the record that the Commissioner of Internal Revenue, in his determination of what was a reasonable allowance for salaries in computing a corporation's net

Reporter's Statement of the Case

income, failed to consider essential factors, or acted arbitrarily, and his finding is sustained by the evidence presented in court, the corporation is not entitled to a refund of taxes based on larger salary deductions.

The Reporter's statement of the case:

Mr. Robert Ash for the plaintiff. *Messrs. Thomas J. Reilly* and *E. S. Griffing* were on the brief.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Johnston Livingston, John G. Livingston, and Frank W. Cooper in the years 1920 and 1921 were the sole officers and stockholders of J. Livingston & Company, and held the positions of president, treasurer, and secretary and general manager, respectively. The three officers referred to had complete control and management of J. Livingston & Company, which was engaged in the business of supplying and installing electrical equipment in buildings under contracts. Said officers secured the contracts for the corporation and performed the usual duties of such officers and exercised general supervision over the construction jobs through the medium of capable superintendents.

II. The total of contracts performed by J. Livingston & Company in the year 1920 was $2,851,247.88; in 1921, $1,886,490.66. The total contract figures for the years in question included $2,396,733.12 in 1920 and $1,538,342.02 in 1921 as cost of equipment and materials supplied by plaintiff for performing its contract.

Plaintiff's net income in the year 1920, without any deductions for salaries, was $102,852.54 and $79,875.99 for 1921, according to plaintiff's tax returns.

III. The stockholdings in J. Livingston & Co. for the years 1920 and 1921 were as follows:

	Common	Preferred
Johnston Livingston	132	185
John G. Livingston	243	790
Frank W. Cooper	125	----------
	500	975

IV. In 1920 plaintiff paid each of its officers $30,000 per year salary and deducted the amount of said salaries from its gross income in making its tax return, claiming said amount as an ordinary and necessary expense of carrying on its business.

V. In 1921 the plaintiff paid each of its officers $23,333.33 per year salary, and deducted the amount of said salaries from its gross income in making its tax return, claiming said amount as the ordinary and necessary expense of carrying on its business.

VI. Upon the audit of the income and excess-profits tax returns for the corporation for the two years in question the Commissioner of Internal Revenue disallowed as expense to the corporation the amount of $6,666.68 in 1920 and $6,666.66 in 1921 paid to Johnston Livingston as salary, $6,666.66 in 1920 and $6,666.65 in 1921 paid to John G. Livingston as salary, and $6,666.66 in 1920 and $6,666.65 in 1921 paid to Frank W. Cooper as salary.

The Commissioner of Internal Revenue ruled that the amounts deducted by plaintiff in its tax returns for the years 1920 and 1921 were unreasonable in amount to the extent of $20,000 in each year and allowed plaintiff as a deduction for salaries in the year 1920, $70,000, and in the year 1921, $50,000.

VII. As a consequence of the disallowance as expenses of a portion of the salaries paid by plaintiff, it was required to pay, and did pay on May 18, 1925, an additional tax of $2,000 for the year 1920 and $2,000 for the year 1921.

VIII. If the Commissioner of Internal Revenue was in error in refusing to allow the claims for refund of the plaintiff, it is entitled to judgment for $4,000 with interest from April 18, 1925.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

This is a tax case. The plaintiff, a New York corporation, challenges the disallowance by the Commissioner of Internal Revenue of a portion of the total sum voted to three officials

of the corporation for salaries in the years 1920 and 1921. Plaintiff is a close corporation; its entire capital stock, both preferred and common, is owned by the officials to whom the salaries involved were paid. In 1918 and 1919 the same officials were each receiving a salary of $15,000.00 per annum. In 1920 their salaries were increased to $30,000.00 a year, and in 1921 they each received $23,333.33. The return of the plaintiff's income for 1920 and 1921 disclosed gross receipts as follows:

1920	$2, 851, 247. 88
1921	1, 886, 490. 66

After allowable deductions, exclusive of the salaries here involved, the net taxable income of the corporation totaled for 1920, $102,852.54, and $79,875.99 for 1921.

The plaintiff's business was electrical engineering and contract work, involving the expenditure of large sums for supplies and equipment to perform its contracts, resulting, it seems from the above figures, in large volume without abnormal profits.

The commissioner's final audit of its income-tax return denied to the plaintiff the right to claim a deduction for salaries paid of the amount claimed, reducing plaintiff's claimed deduction of $90,000.00 in 1920 to $70,000.00 for that year, and the claimed allowance of $70,000.00 in 1921 to $50,000.00, resulting in the assessment of an additional income tax of $4,000 for the two years. Claim for refund was duly filed and denied, and this suit seeks a judgment for $4,000 and legal rate of interest thereon.

The statutes governing the controversy are section 234 (a) of the revenue acts of 1918 and 1921 (40 Stat. 1057, 1077; 42 Stat. 254), both worded alike as follows:

"SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

"(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession of property

to which the corporation has not taken or is not taking title, or in which it has no equity."

Article 105 of Treasury Regulations 45 and 62 reads as follows:

"Among the ordinary and necessary expenses paid or incurred in carrying on any trade or business may be included a reasonable allowance for salaries or other compensation for personal services actually rendered. The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services. This test and its practical application may be further stated and illustrated as follows:

"(1) Any amount paid in the form of compensation, but not in fact as the purchase price of services, is not deductible. (a) An ostensible salary paid by a corporation may be a distribution of dividend on stock. This is likely to occur in the case of a corporation having few stockholders, practically all of whom draw salaries. If in such a case the salaries are based upon or bear a close relationship to the stockholdings of the officers or employees, it would seem likely that the salaries, if in excess of those ordinarily paid for similar services, are not paid wholly for services rendered, but in part as a distribution of earnings upon the stock."

The difficulty we experience in the case is the lack of sufficient proof to sustain the contention that the commissioner's action was unreasonable. Obviously each case is distinct in the matter of salary allowance deductions, and what is or what is not a reasonable salary for personal service is not dependent upon what the corporation allows as such but what the facts establish as reasonable. There is no evidence in the record warranting a conclusion that the commissioner failed to consider the essential factors which enter into a just determination of the issue involved, or acted in any respect arbitrarily. *Seinsheimer Paper Co.* v. *United States*, 63 C. Cls. 429.

While as a matter of first impression it might seem justifiable to accede to plaintiff's contention, predicated upon the volume of business transacted in the years in question, yet in its final analysis the error of so doing lies in the fact that total volume accomplished includes within the payments made large sums for supplies and equipment pur-

chased to perform the contracts. Without minimizing the services of the officials to whom the salaries were paid, we think that in the absence of an express contract for salaries, and judged from the standpoint of profits made, the deductions allowed by the commissioner under the present record were reasonable, and the petition will be dismissed. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge,* and GRAHAM, *Judge,* concur.

SEMMES MOTOR CO v. THE UNITED STATES

[No. H-258. Decided May 6, 1929]

On the Proofs

Statute of limitations; claim for refund of taxes; appeal from proposed additional assessment.—An appeal filed with the Commissioner of Internal Revenue from a report of audit made of a company's books that resulted in notification of a proposed assessment of additional taxes, where it asserts no claim for refund, can not be construed as a claim for refund to prevent the running of the statute of limitations.

The Reporter's statement of the case:

Mr. John A. Sweeney for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is now, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Delaware, with its principal office in Dover, Delaware, and having an office and place of business in the District of Columbia.

II. During the fiscal year ended August 31, 1917, the Semmes Motor Company and the Semmes Motor Line, Incorporated, a corporation existing under the laws of the District of Columbia, and having its principal office and place of business in the District of Columbia, were affiliated

corporations within the purview of the Internal Revenue Laws and Regulations.

III. On March 30, 1918, plaintiff filed with the collector of internal revenue for the district of Maryland, which collection district includes the District of Columbia, an excess-profits tax return for the fiscal year ended August 31, 1917, showing a tax to be due of $7,109.32.

IV. On July 3, 1918, plaintiff filed with the collector of internal revenue for the district of Maryland a corporation income-tax return for the fiscal year ended August 31, 1917, showing a tax to be due, including the excess-profits tax shown on the return filed March 30, 1918, of $8,625.38, which amount was paid to the said collector on July 16, 1918.

V. The Semmes Motor Line, Incorporated, filed income and excess-profits tax returns for the calendar year 1917, showing no taxes to be due thereon.

VI. On March 30, 1918, the Semmes Motor Company filed with the collector of internal revenue for the district of Maryland a claim for abatement of excess-profits taxes due for the fiscal year ended August 31, 1917, in the sum of $294.60, which claim was rejected by the Commissioner of Internal Revenue on or about April 27, 1923.

VII. On October 28, 1921, the Commissioner of Internal Revenue addressed a letter to plaintiff, requesting it to file amended consolidated income and profits tax returns for the period begun January 1, 1917, to August 31, 1917, and for the fiscal years ended August 31, 1918, and 1919.

VIII. On or about January 25, 1922, plaintiff and its affiliated company, Semmes Motor Line, Incorporated, filed with the Commissioner of Internal Revenue consolidated income and excess-profits tax returns for the fiscal year ended August 31, 1917.

IX. On March 2, 1923, the Commissioner of Internal Revenue addressed a letter to plaintiff, which was duly received by it, advising that an additional tax was due for the year ended August 31, 1917, in the sum of $2,802.19.

X. On March 31, 1923, plaintiff filed with the collector of internal revenue at Baltimore, Maryland, for transmission to

the Commissioner of Internal Revenue, a protest against the proposed assessment of additional taxes for the year ended August 31, 1917, which is in words and figures as follows:

"To the COMMISSIONER OF INTERNAL REVENUE:

"The above-named taxpayers are in receipt of a communication dated March 2nd, 1923, from the Commissioner of Internal Revenue notifying us of a proposed assessment of $2,802.19 pursuant to an audit of our books by a representative of your office making net additions to the tax shown by the return made by the company of $2.585.34 for the fiscal year ending August 31, 1917.

"An appeal is hereby taken and noted from this report of audit to the Commissioner of Internal Revenue.

"This company was organized under the laws of the State of Delaware, August 30th, 1915, and took over the assets and business of the Semmes-Kneessi Company, a copartnership, theretofore existing for several years, in consideration of $125,000.00 of the stock of the new corporation.

"The assets consisted of good will, cash, stock of automobiles, accessories, real estate, bills receivable, and negotiable paper.

"The partnership was in a prosperous condition and had been built up from a small investment made about 1910 into one of the agencies for the sale of Hudson and Dodge automobiles and Wilcox trucks and had made profits for the year ending in 1915 of over $20,000.00.

"That the real basis of the business transferred to the Semmes Motor Company was the good will of the business which was made up of those agency contracts which were very valuable.

"That in listing the assets taken over by the Semmes Motor Company from Semmes-Kneessi Company, 628 Pa. Ave. SE., the value of the real estate, 628 Pa. Ave. SE., referred to in the report of audit, was placed at $25,000.00 and the value of the contracts at $34,000.00.

"That the report makes a deduction from the amount of the capital assets at the beginning of the taxable year ending August 31, 1917, of the entire amount of $34,000.00 referred to.

"That the real estate referred to in the report was sold for twelve thousand five hundred dollars ($12,500.00) in the fiscal year of the company ending August 31, 1917, a loss of $13.031.00 which was taken as a deduction from the gross income of the Semmes Motor Company in its return, and but $4,469.48 thereof allowed in the report.

"That depreciation of furniture, fixtures, and tools of $2,950.30 was taken by the company and $2,481.07 only allowed by the return.

EXCEPTION ONE

"The taxpayer, Semmes Motor Company, excepts to the deduction from the value of its capital assets as of the beginning of the year of the intangible asset of $37,000.00 for the reasons: First, that the company paid for this asset in its stock at par value on the same sum; second, that the earning of the Semmes-Kneessi Co. for the year prior to the incorporation of the Semmes Motor Company, exceeded 15% of the total assets of the partnership taking as a part thereof $37,000.00 as the value of the agency contracts referred to, and at a total valuation of $125,000.00; and, third, the whole value of the business of the partnership and this company was based on these intangible assets; fourth, that $20,000.00 of the stock of the corporation was sold for net earnings after paying substantial salaries to its officers of $39,744.52, and in the year 1917 of $39,553.44, as shown by the books of the company.

"It is therefore submitted that the stock issued by the Semmes Motor Company to the owners of the Semmes-Kneessi Co. was worth more than $125,000.00 based on earnings prior to and subsequent to the sale. (See article 367, Regulation No. 33.)

EXCEPTION TWO

"The taxpayer takes exception to the disallowance of the sum of $9,050.75, for losses on the sale of the real estate and depreciation of furniture, fixtures, and tools. (Paragraph two of the report.)

"The facts stated under exception No. 1, going to show the value of the stock of the Semmes Motor Company as being more than par, which it is believed the commissioner will find, will be the proper basis for arriving at the amount actually paid for the real estate. $25,000.00 par of the stock of the company was paid for this real estate, and adding improvements the loss taken in the return of the company should be allowed, as above.

EXCEPTION THREE

"This taxpayer excepts to the deduction of the agency contracts $37,000.00 from invested capital and appreciation

of real estate $8,229.46, for the reasons and on the grounds above given, that the taxpayer paid for both of these assets its stock at par, which stock was worth more than par.

"The taxpayer requests an oral hearing and reserves the right to submit additional evidence and supplemental brief.

"This appeal is not taken for the purpose of delay."

XI. The plaintiff received from the Commissioner of Internal Revenue a letter, dated June 16, 1923, advising that it had been overassessed for the year ended August 31, 1917, in the sum of $5,405.03.

XII. On June 27, 1923, plaintiff filed with the collector of internal revenue at Baltimore, Maryland, for transmission to the Commissioner of Internal Revenue a claim in abatement for the year ended August 31, 1917, in the sum of $2,773.47.

XIII. On November 19, 1923, plaintiff filed with the collector of internal revenue at Baltimore, Maryland, for transmission to the Commissioner of Internal Revenue, a claim for refund for the year ended August 31, 1917, in the sum of $2,602.84, which claim was rejected in full by the Commissioner of Internal Revenue.

XIV. The plaintiff received from the Commissioner of Internal Revenue a letter dated February 12, 1924, together with accompanying statement and schedules, showing various adjustments made and the results thereof in determining the income and excess-profits taxes of the plaintiff and its affiliated corporation, the Semmes Motor Line, Incorporated, for the years ended August 31, 1917, and August 31, 1918.

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

This is an action for the refund of $2,602.84. This tax was paid in July, 1918, and was for a part of the 1917 taxes. A claim for refund filed November 19, 1923, was obviously too late. The document upon which plaintiff relies as constituting a claim for refund was an appeal to the Commissioner of Internal Revenue filed March 31, 1923. This ap-

peal was a protest against an additional assessment, and neither in express terms nor by implication did plaintiff assert any claim for refund. This question has so frequently been decided in the courts that a further discussion of it would seem to be useless. This court said in *Feather River Lumber Co.* v. *United States*, No. F-68, decided May 28, 1928 [66 C. Cls. 54].

"While it has been held that the form of the claim for refund is not essential, there has been no deviation from the well-established rule that the aggrieved taxpayer must assert his right to a refund by an application to the commissioner containing the grounds upon which he relies for such recovery before he will be permitted to bring action for same."

The writ of certiorari in this case has been denied. In *Stauffer, Eshleman & Co.* v. *United States*, No. H-24, decided October 15, 1928 [66 C. Cls. 277], it was said that a request for special assessment could not be construed as a claim for the refund of an amount found refundable when the special assessment was granted. The decision in this case was accepted and no writ of certiorari was asked for. The underlying principle controlling this question was announced by the United States Supreme Court in the case of *Nichols* v. *United States*, 7 Wall. 122, in which it was stated: "And if you (the taxpayer) have complaint to make *you must let the Commissioner of Internal Revenue know the grounds of it;* but if he decides against you, or fails to decide at all, *you can test the question in the courts* if you bring your suit within a limited period of time." (Our italics.) See also *Rock Island Railroad* v. *United States*, 254 U. S. 141.

The petition will be dismissed, and it is so adjudged and ordered.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

JOHN HIRSCHI v. THE UNITED STATES[1]

[No. J-312. Decided May 6, 1929]

On the Proofs

Income tax; oil and gas lease; receipt of consideration; capital assets; gross income.—The consideration received for an oil and gas lease is a part of gross income, for income tax purposes, and is not taxable income from the sale of capital assets.

Same; conflict of Federal and State decisions.—The decision of a State court that an oil and gas lease is real estate does not of itself make the proceeds therefrom capital assets within the purview of the Federal income tax laws. While the Federal courts follow the decision of a State court as to alienation and descent of real estate within its borders, where the question is one of general jurisdiction such as Federal taxation the decision of the State court is not binding upon the Federal court.

A revenue act is an act of Congress passed in the exercise of its constitutional right, and therefore the supreme law of the land, and where the constitutional powers of the Federal Government and the States conflict those of the States must give way.

The Reporter's statement of the case:

Mr. A. H. Britain for the plaintiff. *Messrs. Don. F. Reed*, and *Hatch & Reed* and *Carrigan, Britain, Morgan & King* were on the briefs.

Mr. Lisle A. Smith, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, John Hirschi, is now and was at all times hereinafter mentioned a citizen of the United States and a resident of Wichita Falls, Texas.

II. On March 10, 1924, the plaintiff filed his income-tax return for the calendar year 1923, showing a tax of $8,-856.01, which was paid between March 21, 1924, and December 15, 1924. Thereafter the Commissioner of Internal Revenue, upon a reaudit of plaintiff's return and books, found a deficiency in tax of $6,092.48 for said taxable year. The commissioner notified the plaintiff of his determination of

[1] Certiorari denied.

said deficiency by letter dated March 17, 1927, and assessed said additional tax in September, 1927.

III. In his income-tax return for the calendar year 1923 the plaintiff computed his taxable income upon the following transaction, under the special taxing provisions of section 206 of the revenue act of 1921:

On January 10, 1923, the plaintiff and his wife executed an oil and gas lease to J. J. Perkins and the Texhoma Oil and Refining Company upon a portion of certain farm lands owned by him since 1899 in the State of Texas, a copy of said lease being attached hereto as "Appendix A," by virtue of which the plaintiff and his wife received the total sum of $76,815 in cash during the calendar year 1923. The plaintiff reported one-half of said sum, or $38,407.50, as taxable income from the sale of capital assets and computed and paid a tax at 12½ per cent upon said sum.

IV. On October 10, 1927, the plaintiff paid the additional tax of $6,092.48 referred to in Finding II hereof, together with interest thereon in the sum of $1,130.90, making a total payment of $7,223.38.

V. On October 10, 1927, the plaintiff filed a claim for refund in the sum of $12,568.48, basing said claim on the following grounds:

"Made up as follows:

Claim for refund, 1922, filed March 15, 1927	$8,055.77
Credited October 6, 1927	2,510.67
Due taxpayer, 1922	5,545.10
Additional assessments, 1923, paid Oct. 6, 1927	7,023.38
Total	12,568.48

"1. Failure and refusal of Commissioner of Internal Revenue to assess taxes for 1922 and 1923 under the provisions of section 206, revenue act of 1921, instead of sections 210 and 211 of said act.

"2. Failure and refusal of Commissioner of Internal Revenue to deduct from income the fair value of the leases as of the date of sale.

"3. Failure and refusal of Commissioner of Internal Revenue to allow the taxpayer appropriate amounts for depletion upon alleged advanced royalties."

VI. On December 8, 1927, the Commissioner of Internal Revenue rejected the aforesaid claim for refund on the

ground, in so far as the additional tax of $6,092.48 was concerned, that the sum of $38,407.50 realized by the plaintiff from the granting of the oil and gas lease aforesaid did not constitute a sale of capital assets, taxable under section 206 of the revenue act of 1921, but was a transaction producing ordinary income subject to tax under sections 210 and 211 of said act.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

Plaintiff and his wife entered into a lease with the Texhoma Oil and Refining Company and J. J. Perkins, dated January 10, 1923, by which they leased certain land owned by them in the State of Texas "for the sole and only purpose of mining and operating for oil and gas and laying pipe lines and building tanks, towers, stations, and structures thereon to produce, save, and take care of said products." As consideration for this lease they were to receive $101,815.00, of which $38,815.00 was to be in cash, and a promissory note for $38,000.00, the balance of $25,000 to be paid out of twenty-five per cent of seven-eighths of the oil produced and saved from the leased lands.

During the year 1923 the plaintiff and his wife received from this lease the total of these two sums—namely, $76,815.00—in cash. In making his income-tax return for the year 1923 plaintiff reported one-half of said sum—namely, $38,407.50—as taxable income from the sale of capital assets, and computed and paid a tax of 12½ per cent in accordance with section 206 (a)[1] of the revenue act

[1] SEC. 206. (a) That for the purpose of this title:

(1) The term "capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921;

* * * * * * *

(6) The term "capital assets" as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years (whether or not connected with his trade or business), but does not include property held for the personal use or consumption of the taxpayer or his family, or stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year.

of 1921, 42 Stat. 232, 233. The Commissioner of Internal Revenue thereafter, upon a reaudit of plaintiff's return and books, found and assessed a deficiency tax of $6,092.48, upon the ground that the said amount received under the lease was ordinary income under sections 210 and 211 of said act of 1921. On October 10, 1927, plaintiff filed a claim for refund, which was rejected by the commissioner in so far as the additional sum of $6,092.48 was concerned.

The sum paid by plaintiff for which a refund is sought is $7,223.38, being the said amount of $6,092.48 with interest, amounting to $1,130.90. If the plaintiff is not entitled to the refund of the principal sum, he is not entitled to the interest.

The one question involved is whether the income received by the plaintiff from said lease is taxable as income from the sale of capital assets or is ordinary income. If it is from the sale of capital assets the plaintiff is entitled to a refund; if it is not, he is not so entitled. Since the decision in *Stratton's Independence* v. *Howbert*, 231 U. S. 399, following through *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103; *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503; *United States* v. *Biwabik Mining Co.*, 247 U. S. 116, it has been consistently held that the proceeds received from such leases of oil and mineral lands were to be treated as gross income. The principle is too well established to require extended discussion.

The Board of Tax Appeals, beginning with the case of *Nelson Land & Oil Co.*, 3 B. T. A. 315, and following down through a number of decisions, has uniformly held that sums received as bonus or royalties from such leases of oil and mineral rights were not income from the sale or exchange

(b) In the case of any taxpayer (other than a corporation) who for any taxable year derives a capital net gain, there shall (at the election of the taxpayer) be levied, collected, and paid, in lieu of the taxes imposed by sections 210 and 211 of this title a tax determined as follows:

A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner provided in sections 210 and 211, and the total tax shall be this amount plus 12½ per centum of the capital net gain; but if the taxpayer elects to be taxed under this section the total tax shall in no such case be less than 12½ per centum of the total net income. The total tax thus determined shall be computed, collected, and paid in the same manner, at the same time, and subject to the same provisions of law, including penalties, as other taxes under this title.

of capital assets but gross income. We hold it to be gross income.

The further contention of the plaintiff was that because the Supreme Court of Texas has held that a lease such as in this case is real estate, the proceeds and the royalty and bonus paid were real property, and consequently capital assets and not ordinary income. As stated, it would be sufficient to say that the contrary doctrine, that such leases are not real estate, has been indorsed by the Supreme Court of the United States and by most of the States of the Union, including Arkansas, Oklahoma, Pennsylvania, Illinois, West Virginia, and Virginia. Only several States are in accord with the Texas court; so that, aside from the fact that the weight of authority is against the holding of the Texas court, we see that the difference between the holdings of the courts amounts only to a question as to the proper application to a given state of facts of the *lex loci rei sitæ* doctrine, which is merely a principle of general jurisprudence grounded in reason and good sense, and has existed in nearly all civilized countries since the days of the Roman law. It was accepted as a principle of the common law and early recognized by the Supreme Court in the opinion of Justice Story in *United States* v. *Crosby*, 7 Cranch 115. Its application to the different facts and varying circumstances of cases has given rise to a large body of litigation. To say that the holding of the Supreme Court of Texas on the application of this principle to a given state of facts is sufficient to control the United States courts in the construction of the United States revenue act in the face of the contrary application of the principle by the United States courts is too untenable to require discussion. See *Olcott* v. *Supervisors*, 16 Wall. 678, 690. And while it has been the practice of the United States courts to follow the decisions of the State courts generally in matters concerning the transfer, alienation, and descent of real estate, the construction of wills, and other conveyances as between individuals, the State decisions can not control on a question of general jurisprudence as in this case. See *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Hines Trustees* v. *Martin*, 268

U. S. 458, 463; and *B. & W. Taxicab Co.* v. *B. & Y. Taxicab Co.*, 276 U. S. 518, 529.

This court has held in the case of *Steedman* v. *United States*, 63 C. Cls. 226 (writ of certiorari denied), that the decision of the Supreme Court of Missouri that real estate could not be sold for the payment of administration expenses did not exempt real estate from taxation under a Federal statute; and in the *Aldridge case*, 64 C. Cls. 424, it was held that where the courts of Mississippi held that an administrator could not waive the statute which was running in favor of the estate and against a creditor of the estate, such decision did not prevent an executrix from waiving the statute which was running in favor of the United States in the matter of the adjustment and collection of an overassessment and refund, for the reason that this right was given by the revenue statute and could not be affected by a decision of a State court. See also *Burk-Waggoner Oil Assn.* v. *Hopkins*, 269 U. S. 110, 114; *Nyberg, Admr.*, v. *United States*, 66 C. Cls. 153; and *Atlantic Coast Line R. R.* v. *United States*, 66 C. Cls. 378.

The Federal Government is not limited in its selection of subjects for taxation by the construction of the State courts as to the property rights of individuals, provided the subject taxed was primarily a proper subject for taxation by the United States Government. Congress in passing a revenue act does not, and is not called upon to suit the revenue system of the country to the varying and conflicting decisions and laws of the different States. A revenue act is an act of Congress passed in the exercise of its constitutional right, and therefore the supreme law of the land, and where the constitutional powers of the Federal Government and the States conflict those of the States must give way.

The petition should be dismissed, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

HAZEL M. DAVIS v. THE UNITED STATES

[No. J-235. Decided May 6, 1929]

On the Proofs

Statute of limitations; claim for refund of taxes.—By section 3228 of the Revised Statutes Congress specified the time within which claims for refund of internal revenue taxes might be filed. The Government can be sued only when and as it consents, and where a taxpayer has not filed the proper claim within the time prescribed, suit for refund can not be maintained against the United States.

The Reporter's statement of the case:

Mr. James H. Sykes for the plaintiff.

Mr. McClure Kelley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Hazel M. Davis, is a citizen and resident of the United States of America, and resides in Tulsa, Tulsa County, State of Oklahoma.

II. The plaintiff is a duly enrolled member of the Muskogee (Creek) Tribe of Indians, her name appearing on said approved rolls opposite number 3563, her degree of Indian blood being stated thereon as one-fourth, and her age appearing thereon as two years as of November 7, 1899. Plaintiff attained the age of eighteen years on November 7, 1915, and under the laws of Oklahoma, all female citizens of that State are *sui juris* at eighteen years of age and after. Plaintiff has at no time since her arrival at majority been under guardianship or judicially declared incompetent by any court.

III. Under the act of Congress approved March 1, 1901 (31 Stat. 861), there was duly allotted to the plaintiff a homestead allotment of 40 acres of the tribal lands of the Muskogee (Creek) Tribe of Indians, and a homestead deed of said lands to the plaintiff, dated November 7, 1903, was approved on December 2, 1903, by the Secretary of the Interior as required by law.

IV. The homestead deed aforesaid contained the expressed condition "that said land shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years," from date of patent.

V. Plaintiff, by reason of the provisions of the act of May 27, 1908 (35 Stat. 312), acquired the full right of control over, and alienation of, the lands in the homestead allotment aforesaid, free from governmental supervision, and possessed such rights at all times hereinafter mentioned.

VI. On March 8, 1920, plaintiff, under her then name of Hazel M. Southern, filed an income-tax return pursuant to the provisions of the revenue act of 1918 (act of February 24, 1919, 40 Stat. 1057), showing an income derived exclusively from the proceeds from oil extracted from the lands within the homestead allotment aforesaid, upon which her tax liability was computed as the sum of $411.15, and on January 28, 1921, filed an amended return showing gross income in the same amount and from the same source as on the original return, but with an additional tax liability in the sum of $313.62, making the total tax shown to be due for said year the sum of $724.77.

VII. Payments of the taxes above indicated were made by plaintiff as follows: Four payments of $102 each were made on March 8, June 15, September 28, and December 17, 1920, as the tax shown to be due on the original return, and the additional tax shown to be due on the amended return, in the sum of $313.62, was paid on January 31, 1921.

VIII. The aforesaid payments were made by checks drawn by the plaintiff, and made payable to the proper collector of internal revenue entitled by law to receive the same, and all said checks save the one dated June 14, 1920, bore thereon stamped notations as follows: "Nontaxable, paid under protest." The check dated December 14, 1920, bore the additional stamped statement "Homestead oil royalty income nontaxable." All of the moneys paid as aforesaid have been paid into the United States Treasury as public moneys.

IX. On March 11, 1921, plaintiff, under her then name of Hazel M. Southern, filed an income-tax return pursuant to the revenue act of 1918, for the calendar year 1920, showing

an income derived exclusively from the proceeds from oil extracted from the lands within the homestead allotment of the plaintiff hereinbefore described, upon which income plaintiff's tax liability was shown to be $468.10.

X. This return bore the following notations typed in red:

1. At the top of Schedule E thereof (on which schedule the gross income from oil and gas royalties was reported) it was stated:

"Tax under this schedule paid under protest. Explanation attached."

2. At the end of said schedule there appeared the following statement:

"This schedule shows oil received as royalty on lands owned in fee and sold by parties making return."

3. Under heading "Explanation of deductions," the following statement was made:

"Income shown on Schedule E is received from oil-producing land which I own in fee, and the same is not taxable, as I am not engaged in any business. I am not speculating; I am only selling property which I have owned for 20 years."

XI. The tax shown to be due for the year 1920 was paid by the plaintiff in four equal installments on the following dates: March 14, June 15, September 17, and December 17, 1921.

XII. The payments aforesaid were made by checks drawn by the plaintiff and payable to the collector of internal revenue, each of which checks bore a notation stamped thereon, which was as follows:

"Nontaxable income. Homestead oil royalty. Paid under protest."

All of the moneys aforesaid have been paid into the United States Treasury as public moneys.

XIII. On May 2, 1927, plaintiff filed separate claims for refunds of the sums of $724.77 and $468.10, respectively, as erroneous payments of taxes for the calendar years 1919 and 1920.

XIV. These claims for refunds were in the forms prescribed by the regulations of the Secretary of the Treasury,

and in each the reasons stated for seeking said refunds were as follows:

"This tax was assessed on oil royalty which was produced on my homestead allotment. The lands on which this royalty was produced were allotted to me by the Creek Nation of Indians as my homestead allotment. The deed was issued to me on the 7th day of November, 1903, and under the laws of the United States was and is nontaxable for a period of 21 years from the date of the issuance of the deed and this condition is so nominated and specified in the deed. This tax was paid under protest, which protest was signed by me. A copy of the deed from the Creek Nation (or Tribe) of Indians is hereto attached for the information of the Treasury Department. My name at the time the deed was issued to me was Hazel M. Bland. I paid the tax as Hazel M. Southern. I have married again and my name is now Hazel M. Davis."

XV. At the time plaintiff filed her original returns for the years 1919 and 1920 she filed in connection therewith written protests stating that the whole of her income was received from royalties from oil produced on her homestead allotment and that the same was not taxable. She paid the taxes under protest and indorsed on the check for said taxes the words "Paid under protest."

XVI. On June 18 and November 9, 1927, the Commissioner of Internal Revenue rejected the claims for refunds aforesaid on the sole ground that the same could not be repaid under existing law since the claims were not filed within four years from the dates of payments of the taxes sought to be recovered by the said claims for refunds.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

The plaintiff, an Indian, received income from royalties on oil lands which were tax exempt, and, it is conceded, should not have been taxed in the first place. It is also true that if the refund in proper form and in compliance with the statute had been filed within the statutory period the Commissioner of Internal Revenue would have had to refund the tax.

On March 8, 1920, the plaintiff filed her income-tax return, which showed income derived exclusively from proceeds of

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oil extracted from lands which, as stated, were tax exempt. She attached to her return a written protest against the taxation of this income. Payments were made of the tax on March 8, June 15, September 28, and December 17, 1920, and an additional sum on January 31, 1921, a further tax having been found to be due. Payments were made by check, and each check save one of June 14, 1920, bore thereon stamped the notation "Nontaxable. Paid under protest."

Thereafter, on May 2, 1927, the plaintiff filed claims for refunds, and on June 18 and November 9, 1927, the Commissioner of Internal Revenue rejected the claims on the ground that they could not be paid under the law, since they were not filed within four years from the dates of payment of the taxes. As heretofore stated, plaintiff at the time of filing her returns also filed a written protest.

The plaintiff's claims under section 3228 [1] of the Revised Statutes as amended, 42 Stat. 314, were filed too late, that statute requiring claims for refund to be filed within four years after payment of the tax. Furthermore, it has been repeatedly held by this and other courts that a claim for refund must be filed within the prescribed time, with the proper authority, stating the grounds for the claim. See *Feather River Lumber Co.* v. *United States*, decided May 28, 1928 [66 C. Cls. 54]; *Stauffer, Eshleman & Co.* v. *United States*, decided October 15, 1928 [66 C. Cls. 277]; *Ritter* v. *United States*, 28 Fed. (2d) 265; *United States* v. *Richards*, 27 Fed. (2d) 284, certiorari denied by Supreme Court September, 1928; *Rock Island, etc., R. R. Co.* v. *United States*, 254 U. S. 141; and *Tucker* v. *Alexander*, 275 U. S. 228.

The Government can be sued only when and as it consents, and where it has prescribed the acts and forms for bringing an action against it, those acts and forms must be strictly complied with. It has stated in its statutes that a claim for refund in writing must be filed within four years after payment of tax, stating the grounds for the claim. The plaintiff has failed to do this and clearly has not complied

[1] All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * * must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax * * *.

with the requirements of the statute which would give her the right to sue in this court, and the petition should be dismissed, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

WALTER C. PALMER, TRUSTEE IN BANKRUPTCY OF THE RACINE AUTO TIRE COMPANY, v. THE UNITED STATES

[No. H-224. Decided May 6, 1929]

On the Proofs

Income and profits taxes; amortization of war facilities; use as deduction until exhausted.—The deduction in computing net income of the amortization of facilities for the production of articles contributing to the prosecution of the World War, provided by section 234 (a) (8) of the revenue act of 1918, is not limited to a particular year, and where the use of such amortization in one year is not exhausted in extinguishing the tax for that year, the balance may be used as deductions in succeeding years until exhausted.

Statutory construction; departmental regulation; lack of ambiguity.—Where the language of a taxing statute is clear and unambiguous, a regulation of a department construing it contrary to its plain import will be disregarded by the court.

The Reporter's statement of the case:

Mr. Elbert B. Hand for the plaintiff. *Hand & Quinn* were on the brief.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. R. P. Hertzog* was on the brief.

The court made special findings of fact, as follows:

I. The Racine Auto Tire Company, on and prior to February 9, 1922, was a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business in the city of

Racine, Wisconsin, and was engaged in the manufacture of rubber tires for automobiles and trucks and other like products.

II. On February 9, 1922, the Racine Auto Tire Company was duly adjudicated bankrupt by the United States District Court for the Eastern District of Wisconsin, and on February 24, 1922, one Harold O. Smith was elected trustee in bankruptcy of said corporation, qualified as such, and continued to act as trustee in the liquidation of said bankrupt estate until April 23, 1927, when a new trustee, to wit, Walter C. Palmer, of Racine, Wisconsin, was appointed as trustee of said bankrupt corporation to complete the administration of said trust. He filed a bond as provided by the order of the referee in bankruptcy, which was approved, and he is now the duly qualified and acting trustee in bankruptcy of said Racine Auto Tire Company.

III. Exhibit A attached to the petition and made a part hereof by reference, is a duly authenticated copy of the record of the appointment of Walter C. Palmer as trustee in bankruptcy of said bankrupt corporation.

IV. Between the dates of April 6, 1917, and November 11, 1918, the Racine Auto Tire Company was engaged in the production of articles contributing to the prosecution of the World War. During such period the company acquired buildings, machinery, and equipment for the production of such articles, in the amount of $445,592.72. Said production of articles contributing to the prosecution of the war was discontinued by the company on November 11, 1918. By reason of certain contracts entered into by the company between the dates of April 6, 1917, and November 11, 1918, it was required to expend during the year 1919 the sum of $4,412.21 for additional buildings, machinery, and equipment, said contracts having been entered into solely by reason of the company's production of articles contributing to the prosecution of the war. The residual value of these facilities as of March 3, 1924, was as follows:

1917 and 1918 costs	$193, 867. 00
1919 costs	1, 730. 74

On October 16, 1925, a report of L. E. Luce, engineer, signed also by C. B. Watkins, reviewing engineer, and ap-

proved by J. T. Keenan, chief of section of the Engineering Section of the Income Tax Unit, was made and filed, a copy of which report is attached to the petition marked "Exhibit B," and made part hereof by reference. In and by said report, it was determined that the Racine Auto Tire Company had acquired buildings, machinery, and equipment for the years 1917, 1918, and 1919 for the production of articles contributing to the prosecution of the World War in the aggregate sum of $450,004.93; that the same had a residual value of $195,597.74 and that the loss to the company was the sum of $254,407.19, which said last named amount was recommended by said engineers as a proper deduction on account of amortization to be allowed and deducted in computing the net income of said corporation for income-tax purposes as follows:

1918	$251, 725. 72
1919	2, 681. 47

V. The amortization recommended by the engineers in the sum of $254,407.19 was apportioned by the Commissioner of Internal Revenue as follows: $251,725.72 for the year 1918 and $2,681.47 for the year 1919. The net taxable income of the Racine Auto Tire Company for the year 1918 as adjusted without the benefit of the amortization deduction was the sum of $160,821.76, which net taxable income was entirely extinguished and eliminated by applying against the same the loss previously allowed in the sum of $251,725.72 by the Commissioner of Internal Revenue as aforesaid, on account of the amortization of war facilities. After the application of said loss to net taxable income for the year 1918, there remained an excess of loss previously allowed as aforesaid on account of amortization of war facilities in the sum of $90,903.96.

VI. Plaintiff on September 8, 1923, filed with the collector of internal revenue at Milwaukee, Wisconsin, a claim for refund of $20,932.92 (or such greater amount as is legally refundable) for income and excess-profits taxes paid by the Racine Auto Tire Company for the taxable year 1919, a copy of which claim is attached to the petition marked "Exhibit C," and made part hereof by reference, which said claim is based upon a loss to the company as a taxpayer on

account of the amortization of war facilities in excess of the taxable income for the year 1918. The Commissioner of Internal Revenue rejected the claim for refund in the amount of $15,117.98 and allowed such claim for $5,814.94, in letters bearing dates June 24, 1925, and July 26, 1926, copies of which are attached to the petition, marked "Exhibit D" and "Exhibit E," and made part hereof by reference. The net taxable income of said company for the year 1919 as finally ordered and approved by the Commissioner of Internal Revenue was $128,457.46.

VII. Pursuant to the revenue act for the year 1918 and other acts of Congress of the United States relative thereto, the Racine Auto Tire Company, on the 15th day of March, 1920, made to the collector of internal revenue at Milwaukee, Wisconsin, return of its income for the year 1919, and paid into the Treasury of the United States the tax assessed upon said income for 1919 in the sum of $40,568.32; and thereafter it paid additional assessments for the year 1919 in the sum of $7,993.20, making the aggregate payment for the year 1919 $48,561.52. Of said sum of $48,561.52 paid on its income for the year 1919, it has received refunds from the United States amounting to $21,035.32, leaving the net amount paid for income and excess-profits taxes for the year 1919 over and above all of said refunds received, $27,526.20. Plaintiff claims refund of a balance of $23,970.85 with interest from March 15, 1920.

The court decided that plaintiff was entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This case involves the question of the allowance of amortization of war facilities as a deduction against gross income under section 234 (a) (8)[1] of the revenue act of 1918, 40 Stat. 1057, 1077.

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[1] SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * * * *

(8) In the case of buildings, machinery, equipment, or other facilities, constructed, erected, installed, or acquired, on or after April 6, 1917, for the production of articles contributing to the prosecution of the present war, and in the case of vessels constructed or acquired on or after such date for the transportation of articles or men contributing to the prosecution of the present war,

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There is no dispute about the amount of amortization allowable to the plaintiff under the facts. The amount allowed was as follows:

1918	$251, 725. 72
1919	2, 681. 47

The net taxable income of the Racine Auto Tire Company for the year 1918 as adjusted without the benefit of the amortization deduction was $160,281.76. This income, as will be seen, was entirely extinguished by applying against it the losses previously allowed in the sum of $251,725.72 on account of amortization of war facilities, thus leaving after the application of the net taxable income for the year 1918 an excess of loss allowed on account of amortization of war facilities in the sum of $90,903.96.

The Commissioner of Internal Revenue in adjusting the company's tax for the year 1919 refused to allow as a deduction for amortization in that year any part of the balance of $90,903.96, except so much of it as was allowed as amortization for 1919; that is to say, he declined to spread the balance of the amortization remaining uncredited for the year 1918 over the year 1919 and to use it as a credit against the 1919 taxes. The one question here is whether this decision of the Commissioner of Internal Revenue should be upheld.

The question depends upon the construction of the statute involved, section 234 (a) (8) of the revenue act of 1918, heretofore cited. While the Commissioner of Internal Revenue has authority to make regulations which are reasonable and not in conflict with the purpose and intent of the statute, he has no authority to extend or limit the statute

there shall be allowed a reasonable deduction for the amortization of such part of the cost of such facilities or vessels as has been borne by the taxpayer, but not again including any amount otherwise allowed under this title or previous acts of Congress as a deduction in computing net income. At any time within three years after the termination of the present war the commissioner may, and at the request of the taxpayer shall, reexamine the return, and if he then finds as a result of an appraisal or from other evidence that the deduction originally allowed was incorrect, the taxes imposed by this title and by Title III for the year or years affected shall be redetermined and the amount of tax due upon such redetermination, if any, shall be paid upon notice and demand by the collector, or the amount of tax overpaid, if any, shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

by regulation, and if the language of the statute is plain, unambiguous, and comprehensive, the regulation must conform to it. The construction of the department, where there is no ambiguity, will be disregarded. *Houghton* v. *Payne*, 194 U. S. 88, and *Iselin* v. *United States*, 270 U. S. 245.

The language of section 234 (a) (8) as to amortization is in substance that in the case of buildings and other things erected or acquired after April 6, 1917, for the production of articles contributing to the prosecution of the war, and in the case of vessels constructed or acquired for the transportation of articles or men for the same purpose—

"* * * there shall be allowed a reasonable deduction for the amortization of such part of the cost of such facilities or vessels as has been borne by the taxpayer."

The act further provides that at any time within three years after the termination of the war the commissioner shall, at the request of the taxpayer, reexamine any return, and if he finds that the deduction allowed for amortization is incorrect, the amount of the tax due can be redetermined, and in the event the tax has been overpaid, the amount so found shall be credited or refunded to the taxpayer.

It will be observed that there is no limitation as to the years or periods within which the ascertained amortization shall be used as a credit. If the amortization provided for in the statute has been determined by the commissioner, the statute provides that said amount shall be allowed "as a deduction in computing net income." There is no ambiguity about this language. It is simple, direct, and clear. It in effect gives the taxpayer the right to have the sums allowed as amortization deducted, which means that he shall be entitled to a credit on taxes due the Government to the extent of this allowance, and that he can have his taxes found due the Government paid by a credit on this allowance until the allowance is exhausted.

This provision as to amortization is general in terms and unambiguous and mandatory, for the act says "shall be allowed"; and so should not be limited or restricted in application, expressly or by implication, or confined to any

period, i. e., one year or two years, or a war year or a peace year.

It is a remedial statute, evidently intended to afford relief from abnormal conditions incident to the prosecution of the war, and should be liberally construed to effectuate, in accord with its spirit, the remedy which it was intended to afford. When a privilege or concession is granted, as in this statute, it is the duty of the court to give the largest and broadest construction in favor of the concession which the language used will allow in order to afford the relief which the context indicates was intended. The evident purpose of the statute was to enable taxpayers of the class named who had incurred excess cost over pre-war or normal times to apply such ascertained excess in reducing income reported for taxation, and to relieve the taxpayers from this income tax until said excess had been absorbed. They were thus placed on an equal footing with those who had constructed their plants prior to the war or under normal conditions.

Therefore, until the whole of the amount of ascertained amortization has been allowed the purposes and conditions of the statute have not been fulfilled, and not to fulfill them by limiting them in any way is to defeat the purpose of the act.

Without extending the discussion, it is evident from the facts that this affords a strong case for relief from the ruling of the commissioner. There is no question about the amount allowable as amortization. It is $254,407.19. Nor is there any dispute that of this sum $160,821.76 was allowed as a credit to the company in full payment for its tax for the year 1918, and that of the remaining sum only $2,681.47 was allowed as a credit on its income for the year 1919, leaving of the ascertained amount of amortization uncredited to it the sum of $90,903.96, which the commissioner refused to credit on its income for 1919.

The plaintiff is entitled to a credit of the balance of said amortization remaining from the settlement of the company's taxes for 1918, on its 1919 taxes, in the sum of

$23,970.85, with interest from March 15, 1920, which is the amount claimed by plaintiff.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

EDMOND CORNELIS VAN DIEST, ALFRED HERBERT HUNT, AND RUSH LA MOTTE HOLLAND, LIQUIDATING TRUSTEES OF THE ASSOCIATED ENGINEERS COMPANY, v. THE UNITED STATES

[No. J-93. Decided May 6, 1929]

On the Proofs

Income tax; deductions; loss sustained during taxable year; regulation of Treasury Department.—Under the rules and regulations of the Treasury Department the loss allowable as a deduction under section 234 (a) of the revenue act of 1924 does not include mere shrinkage in value of stock "through fluctuation of the market or otherwise," but must be a loss that is "actually suffered when stock is disposed of." This regulation unless shown to be unreasonable and not in accord with the spirit and purpose of the act, is applicable to a taxpayer claiming the benefit of such a loss in his tax return.

The Reporter's statement of the case:

Mr. George E. Strong for the plaintiffs. *Holland & Strong* were on the brief.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of facts, as follows:

I. The plaintiffs, Edmond Cornelis Van Diest, Alfred Herbert Hunt, and Rush La Motte Holland, are liquidating trustees of the Associated Engineers Company, a corporation organized in 1909 under the laws of the State of Colorado, with its principal office and place of business at Colorado Springs, Colorado, which corporation existed as such

until its dissolution on September 22, 1925, at which time the plaintiffs were the directors thereof, and as such then became and now are its liquidating trustees, in which capacity they bring this suit.

II. The Associated Engineers Company made and duly filed its corporation income-tax return for the calendar year 1924, on March 6, 1925, showing thereon a tax liability of $1,783.08, which tax was paid in three installments as follows: $445.77 paid March 6, 1925; $445.77 paid June 11, 1925; and $891.54 paid September 11, 1925.

III. The only item in controversy herein is the item of $8,000.00, representing the cost to the Associated Engineers Company in 1915 of one hundred shares of common stock of the Chadron Ice & Creamery Company, which was claimed as a loss in the year 1924, and deducted from gross income on corporation income-tax return filed by the Associated Engineers Company for the calendar year 1924. The Commissioner of Internal Revenue has disallowed this claimed deduction from gross income.

IV. At the direction of the Commissioner of Internal Revenue a revenue agent examined the books of account and records of the Associated Engineers Company relating to the calendar year 1924, as a result of which on July 14, 1926, a certificate of overassessment in the sum of $79.81 for the calendar year 1924 was approved and scheduled for payment. The allowances as shown in the said certificate of overassessment were based upon grounds other than the deduction of $8,000 from gross income on account of the alleged loss incurred through the ownership of one hundred shares of stock in the Chadron Ice & Creamery Company referred to in Finding III hereof.

V. Under date of December 3, 1926, a claim for refund for the calendar year 1924 in the sum of $1,079.81 was filed by the plaintiffs herein on behalf of the Associated Engineers Company with the collector of internal revenue for the district of Colorado, and by said collector was transmitted to the office of the Commissioner of Internal Revenue.

VI. On March 3, 1927, a letter was addressed to the taxpayer, signed by C. R. Nash, assistant to the commissioner,

by F. R. Clute, head of division, rejecting in full said claim for refund.

VII. The Chadron Ice & Creamery Company had been organized with an authorized capital stock of $60,000. At the close of the fiscal year 1924 two hundred and fifty shares of its common stock of the par value of $25,000 had been issued and were then outstanding. As stated in Finding III hereof, one hundred shares of the common stock of the said corporation had been acquired by the Associated Engineers Company in the year 1915 at a total cost to it of $8,000.

With the exception of one year, the Chadron Ice & Creamery Company, from the year of its organization until its reorganization in the early part of 1925, showed a constant operating loss. For some time prior to November 13, 1924, the company had been operated under a contract or lease by Orin J. Schwieger and Scott K. Beghtel. During the period of their operation of the business they had incurred a substantial amount in obligations which they failed to liquidate. On November 13, 1924, the contract with Messrs. Schwieger and Beghtel was terminated and the possession of the company's physical property was returned to it.

Early in December, 1924, the president of the corporation called a joint meeting of the company's stockholders and principal creditors, at which meeting ninety per cent in amount of the stock issued and outstanding, including the one hundred shares owned by the Associated Engineers Company, was represented, for the purpose of endeavoring to devise some plan for the readjustment of the affairs of the company.

VIII. The assets and liabilities of the Chadron Ice & Creamery Company as of December 31, 1924, are as follows:

THE CHADRON ICE & CREAMERY COMPANY

Statement of assets and liabilities, December 31, 1924

Assets:	
Cash	$51.85
Notes receivable	614.01
Accounts receivable	5,892.29
Total	6,558.15

Reporter's Statement of the Case

Assets—Continued.		
Less reserve for bad debts	$1,041.57	
		$5,516.58
Inventories, stock and supplies		4,058.82
Machinery and equipment	31,265.22	
Less reserve for depreciation	10,786.59	
		20,478.63
Total assets		30,054.03
Liabilities:		
Bank overdraft	1,316.77	
Notes payable	59,491.20	
Accounts payable	8,767.14	
Total liabilities		69,575.11
Deficit, excess of liabilities over assets		39,521.08
Deficit account	59,910.25	
Capital stock account	25,000.00	
Net deficit shown by the books		34,910.25
Add book debits:		
Stock discount	4,640.00	
Deferred expenses	83.74	
Total	4,723.74	
Less deferred credits	112.91	
		4,610.83
Total, deficit as above		39,521.08

IX. On January 6, 1925, the plan formulated at the December meeting of the stockholders and creditors of the Chadron Ice & Creamery Company, referred to in Finding VII hereof, was reduced to writing and signed by the parties in interest thereto. In form the writing included an offer by the Western Public Service Company, one of the three largest creditors of the Chadron Ice & Creamery Company and the owner of the premises occupied by it, to purchase certain of the company's assets upon certain conditions stated in the offer. It also included the acceptance of the offer by the company's stockholders and its three largest creditors, the First National Bank of Chadron, the Citizens State Bank of Chadron, and the Western Public Service Company. The formal consummation of the plan adopted in December of 1924 was delayed until January 6, 1925, because of the absence of certain of the stockholders of the Chadron Ice & Creamery Company.

The first paragraph of the writing of January 6, 1925, is as follows:

"In view of the announced decision of a majority of the stockholders of the Chadron Ice & Creamery Company to liquidate the indebtedness of the company, in view of the unprofitable character of its business in the past, the Western Public Service Company to facilitate such liquidation on an equitable basis makes you the following offer."

The second paragraph contains the offer of the Western Public Service Company to pay $12,207 in cash for the ice plant or factory of the Chadron Ice & Creamery Company at its then inventory value of $12,207. The offer was made contingent upon the application of the proceeds of the sale and on a settlement being effected with creditors of the Chadron Ice & Creamery Company "in order that a receivership or bankruptcy of the Chadron Ice & Creamery Company may be avoided."

The manner in which the $12,207 was to be distributed among the creditors is provided for. The writing contemplates the amending of the articles of incorporation and the by-laws to provide for the issuance of $60,000 in preferred stock, which preferred stock is to be accepted by the creditors in full settlement of their respective obligations. The articles of incorporation and the by-laws as amended were to provide that—

"All dividends, whether earned or liquidating of the Chadron Ice & Creamery Company, shall be applied to the retirement of said preferred stock, and the owners and holders thereof shall be entitled to have the same first retired out of any such dividends before any earned or liquidating dividends are paid on account of the common stock, said preferred stock is to be retired as soon as may be out of such dividends, and no earned or liquidating dividend whatever shall be declared and paid in favor of the common stock now outstanding or hereafter issued until the said preferred stock is paid off and retired in full, * * *."

X. Before the agreement could be fully carried out, the Citizens State Bank of Chadron, one of the creditors, went into receivership, and the receiver refused to accede to the proposed arrangement. In order to meet this situation, the preferred stock which was to be issued to the Citizens State

Bank of Chadron was purchased by the other creditors for cash and the cash so obtained was applied in payment of the claim of the Citizens State Bank. Under this arrangement the Associated Engineers Company purchased eighty-seven shares of the preferred stock of the Chadron Ice & Creamery Company for the sum of $8,700. On February 11, 1926, the one hundred shares of stock of the Chadron Ice & Creamery Company, purchased by the Associated Engineers Company in 1915, as aforesaid, were called in by the Chadron Ice & Creamery Company and canceled, and on the same date the eighty-seven shares of the preferred stock referred to were issued.

XI. It does not satisfactorily appear that the stock of the Chadron Ice & Creamery Co. was ascertained to be and was worthless in the year 1924, or that it was charged off on the books of the Associated Engineers Company in that year.

The court decided that plaintiffs were not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

Plaintiffs have been the liquidating trustees of the Associated Engineers Company since its dissolution on September 22, 1925. In 1915 said company purchased 100 shares of the common stock of the Chadron Ice & Creamery Company for $8,000. The said Engineers Company in making its return in March, 1925, for its 1924 tax, claimed a deduction of $8,000, the amount paid for this stock as becoming and as ascertained to be worthless in the year 1924. On an examination of the books and records of the Engineers Company the Commissioner of Internal Revenue disallowed this claimed deduction but issued a certificate of overassessment for $79.81 on another ground, in favor of the company, which certificate is still held by the General Accounting Office subject to the demand of the plaintiffs.

On December 3, 1926, the plaintiffs filed a claim for refund for the year 1924, in the sum of $1,079.81, the amount sued for here, $1,000 of which related to the disallowance of the item of $8,000 claimed as a credit, the remainder,

Opinion of the Court

$79.81, related to the claim already allowed as stated. On March 3, 1927, said claim for refund was rejected.

The said Chadron Company was reorganized on January 6, 1925, and thereafter the Engineers Company purchased 87 shares of its preferred stock issued under the reorganization for the sum of $8,700, and on February 11, 1926, surrendered to the said reorganized company for cancellation the said 100 shares of stock, and received at the same time 87 shares of the preferred stock. Thus, the date of the actual surrender or sale of the said 100 shares of the Chadron stock, the date when its possession and ownership terminated, was February 11, 1926.

The applicable regulation of the Commissioner of Internal Revenue, No. 65, Article 144, deals with losses on stocks and provides that when shrinkage of value is claimed the allowable loss must be actually suffered when the stock is sold. If it is claimed to be worthless its cost or other basis may be deducted "in the taxable year in which it became worthless provided a satisfactory showing of its worthlessness be made, as in the case of bad debts." There is nothing in the record to indicate that this regulation is unreasonable and not in accord with the spirit and purpose of the act. The burden of showing compliance with the regulation is upon the plaintiffs, and this they have failed to do.

The court has found that it does not satisfactorily appear that the stock was worthless or so ascertained to be in the year 1924, or that it was charged off on the books in that year as worthless. This disposes of that portion of the plaintiffs' claim amounting to $1,000, which was based upon the right to deduct this stock as a loss. The balance of the claim, $79.81, has already been passed upon and allowed by the commissioner, and certified to the General Accounting Office, and has since July, 1926, been at the disposal of the plaintiffs.

The petition should be dismissed, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

CHICAGO FROG & SWITCH CO. v. THE UNITED STATES[1]

[No. H-357. Decided May 6, 1929]

On Demurrer to Petition

Income tax; jurisdiction; discretion of Commissioner of Internal Revenue in applying internal-revenue laws.—See *Williamsport Wire Rope Co.* v. *United States*, 63 C. Cls. 463.

The Reporter's statement of the case:

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer. *Mr. Karl D. Loos*, opposed.

The material averments of the petition are stated in the following

MEMORANDUM BY THE COURT

The petition shows that the plaintiff is a corporation which paid income and excess-profits taxes for the year 1918, and upon this payment it claims to be entitled to a refund. More specifically, the petition alleges that plaintiff is entitled to recover $192,592.95 for taxes and interest overpaid, which were wrongfully and illegally assessed against the plaintiff by the Commissioner of Internal Revenue. The basis of this allegation, as stated in the petition, is that the commissioner undertook to assess its profits tax for the year 1918 in the manner prescribed by section 328 of the revenue act of 1918, 40 Stat. 1057, but that said profits tax was not the amount which bore the same ratio to the net income of plaintiff (in excess of the specific exemption of $3,000) for the calendar year 1918 as the average tax of representative corporations, engaged in a like or similar trade or business, whose invested capital could be satisfactorily determined under section 326 of said act and which were, as nearly as may be, similarly circumstanced as compared with plaintiff within the meaning of section 328, bore to their average net income for the taxable year 1918,

[1] Certiorari denied.

all as required by said section 328. The petition further alleges in substance that the commissioner did not select the proper corporations for comparison and determination of plaintiff's profits tax.

The decision in the case at bar is controlled by the case of *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551. In the instant case it will be observed that the plaintiff was granted a special assessment under the provisions of section 328, but alleges that by reason of the proper comparatives not being taken its tax was wrongfully computed. In other words, the plaintiff claims, in the language of the statute, that "representative corporations engaged in a like or similar trade or business" were not selected as required by the statute. But in the *Williamsport Wire Rope Co. case*, *supra*, it was held that this presented a question of administrative discretion which is not reviewable by this court.

The demurrer must be sustained and the petition dismissed. It is so ordered.

JOHN E. MURRAY, T. M. BLAKE, CHARLES SCHAEFER, JR., AND ROSE GASTEIGER, EXECUTRIX OF JOHN W. GASTEIGER, DECEASED, v. THE UNITED STATES

[No. D-112. Decided May 6, 1929]

On the Proofs

Contract; performance; extension of time; authority.—Where a contract provides that an extension of time for performance must be authorized by the contracting officer, plaintiff can not recover on the basis of a permission granted by another officer.

The Reporter's statement of the case:

Mr. Jennings C. Wise for the plaintiffs.

Mr. John E. Hoover, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Joseph Henry Cohen* was on the briefs.

Reporter's Statement of the Case

This case was originally decided May 4, 1925, and a motion for new trial was allowed June 15, 1925. The original decision was adhered to, as appears in the memorandum on the new trial.

The following are the facts as found by the court:

I. The International Recompressing Company was incorporated under the laws of the State of New York on July 13, 1917, with its principal office at 14 Church Street, New York City, and was dissolved on October 1, 1918. The said company was organized for and was engaged in operating plants for the selling and recompressing of hay at Philadelphia, Pa., and New Durham, N. J.

John E. Murray was president and John H. Irvin was general manager of the company and purchased the plant at the time of dissolution.

The entire stock of the said corporation was four hundred shares, owned and held as follows:

Thomas M. Blake, 84 shares;

Charles Schaefer, jr., 84 shares;

Rose Gasteiger, executrix of John W. Gasteiger, 64 shares; and

John E. Murray, 168 shares.

In the holdings of John E. Murray, John H. Irvin claims a one-third interest.

II. On April 1, 1918, the International Recompressing Company entered into a contract with the United States (Form FF 688—SF 1944), whereby it was agreed that the International Recompressing Company would furnish and deliver during the period commencing April 1, 1918, and ending May 28, 1918, 10,000 tons of hay, No. 2 timothy, recompressed, at $36.75 per ton, to be delivered to the Quartermaster Corps, U. S. Army, as follows:

7,000 tons f. o. b. New York, free lighterage.

3,000 tons f. o. b. cars, Philadelphia compressing plant.

A copy of this contract is filed with the petition of the plaintiff marked Exhibit A, and is made a part hereof by reference.

III. During the life of the contract the International Recompressing Company contracted also with the Govern-

ment to recompress 1,400 tons of hay, 900 tons on a contract with Charles Schaefer, jr., a large stockholder in the company, and 500 tons for shipment overseas. The United States Government agreed to pay $7 a ton for recompressing.

Of the 900 tons agreed to be recompressed for the United States under the Schaefer contract only 759¾ tons were delivered to the S/S *Knutt* on June 12, 1918. This delivery was made fifteen days after the period of expiration of the contract of April 1, 1918, now under consideration.

The evidence does not disclose when any deliveries for overseas were made and does not show when the recompressing was done under the Schaefer contract. There is no evidence of the daily capacity of the compresses.

IV. On May 21, 1918, the Quartermaster General notified the International Recompressing Company to discontinue recompressing hay at all plants until further notice.

V. On May 23, 1918, the following letter was written to the International Recompressing Company:

WAR DEPARTMENT,
OFFICE OF THE DEPOT QUARTERMASTER,
New York City, May 23rd, 1918.

In answer refer to file No. 464.4 FF–F.
From: Depot Quartermaster, New York, N. Y.
To: International Recompressing Co., 14 Church Street, New York.
Subject: Recompressed hay.

1. By telephone authority from Captain Langenberg, Fuel & Forage Division, Office of the Quartermaster General, U. S. A., Washington, you may continue to operate your recompressing plants to fill the balance of the present contract with you for recompressed hay, if you can store the hay at your own warehouses; storage rate to be arranged with you later.

2. If you have no storage room or if you have not storage room for all of it, kindly advise this depot at once.

3. Please acknowledge receipt of this letter.

By authority of the Depot Quartermaster.

FUEL & FORAGE DIVISION,
ALBERT F. LOPEZ,
Captain, Q. M. R. C., in Charge.

VI. On May 25, 1918, the International Recompressing Company was given shipping instructions in writing as to

"such portion of the balance due this depot on contract FF 688—SF 1944, as you may be able to recompress by May 28, original expiration date"; also "this depot has wired to the chief of forage with reference to allowing you to commercialize such hay as you may have at New Durham which you can not compress by May 28."

VII. On the same day (May 25) the New York office notified the chief of forage at Chicago: "Murray has hundred cars at New Durham single baled; can not possibly recompress by 28th. May he sell commercially or shall we extend delivery time?"

The chief of forage at Chicago answered at once: "Do not extend time delivery contract expiring 28th. Permit Murray dispose of commercial hay. Notify inspectors when to close inspection."

VIII. Upon the expiration of the contract on May 28, 1918, there had been furnished and delivered to the United States 7,090 tons, for which the contractor has received payment, leaving a balance of 2,910 tons unfurnished and not delivered.

The evidence does not disclose that the plants were actually discontinued in operation from May 21 to May 23, nor does it show any loss, damage, or inconvenience resulting from the temporary suspension order, nor is any claim made by the company because of said suspension order.

IX. On May 31, 1918, John E. Murray, president of the International Recompressing Company, wired the chief of forage branch, Chicago, requesting an extension to complete the contract, alleging failure to fulfill contract was occasioned by "considerable delay by overcritical inspection; serious labor shortage; failure in part of railroad to make proper switching; and further during *life of contract* plants compressed hay for the Government not applying on our contract to the extent of many hundreds of tons."

X. There was no request for an extension of time during the life of the contract; there was no tender during the life of the contract of the full tonnage; no recompressed hay was on hand when the contract expired.

XI. During the life of the contract the hay market was on the decline, so that on the 28th the price of timothy No. 2 was fixed at $25 a ton. In the open market it varied between $24 and $27 a ton. The mean was $25.50. Seven dollars a ton was charged for recompressing.

The court decided that plaintiffs were not entitled to recover.

MEMORANDUM BY THE COURT ON THE ORIGINAL TRIAL

The plaintiffs rely for recovery upon a letter written by Capt. Albert F. Lopez, of the Fuel and Forage Division of the Quartermaster Corps, stationed in New York. The plaintiffs claim that this letter extended the time for the performance of the contract. The contract provides that an extension of time for the performance of the contract must be authorized by the contracting officer, and Captain Lopez was not the contracting officer and had no authority from the contracting officer to extend the time of the performance of the contract. Moreover, the letter itself does not extend the time for the performance of the contract, and that thi was the construction placed upon it at the time is borne out by the correspondence between the parties, for on May 25, 1918, the plaintiffs were given shipping instructions as to such portion of the hay due on the contract as they might be able to recompress by May 28th, the original expiration date; and on the same date plaintiffs were notified that the depot quartermaster at New York "has wired to the chief of forage with reference to allowing you to commercialize such hay as you may have at New Durham which you can not compress by May 28." On the same day Lopez, for the New York office, notified the chief of forage at Chicago, that Murray had 100 cars at New Durham of single-baled hay which he could not possibly recompress by May 28, and asked, "May he sell commercially or shall we extend delivery time?" Thus showing that it was not contemplated by Lopez that an extension of time had been granted by his letter of May 23, 1918. That the plaintiffs did not regard the said letter as an extension of time is

Syllabus

evidenced by the fact that on May 31, 1918, they wired to the chief of forage at Chicago requesting an extension of time to complete the contract.

MEMORANDUM BY THE COURT ON THE RETRIAL

This case is before the court for the second time, a motion for a new trial having been allowed upon the grounds of newly discovered evidence. The newly discovered evidence was said to be the fact that Captain Lopez wrote the letter of May 23, 1918 (Finding V), not only upon the verbal but also the written authority of Captain Langenberg, who was Acting Quartermaster General in the absence of the Quartermaster General, and who in a written letter to him expressly extended the time for the completion of the contract of April 1, 1918, in order that the hay for the Canal Zone might be recompressed by the contractor. The plaintiffs have failed to prove the existence of said letter, leaving no additional testimony except the quoted excerpts from the Manual for the Quartermaster Corps. This, we think, is insufficient to supply the absence of authority upon which the court previously acted in dismissing the petition. Therefore, the court adheres to its original conclusion, reported on May 4, 1925, which it hereby again adopts and reports, with an order dismissing the petition. It is so ordered.

CASTNER, CURRAN & BULLITT, INC., v. THE UNITED STATES

[No. D–381. Decided May 13, 1929]

On the Proofs

Contract for purchase of requisitioned vessels; difference between estimated and actual cost of construction.—Under the terms of a resolution of the United States Shipping Board, accepted by the plaintiff, certain vessels of the board, theretofore requisitioned, together with the contracts therefor, from plaintiff's predecessor in interest, were sold to the plaintiff, the board to pay to the plaintiff the difference between an amount estimated as the cost, and the actual cost as determined by an audit of the shipbuilder's books, the shipping board at its own expense

Reporter's Statement of the Case

to place the vessels in seaworthy condition, to remove gun mounts, emplacements, and otter gear, and to restore to condition as shown by the original plans. The contract construed and the proof reviewed, and *held* to entitle the plaintiff to recover the full difference between the cost tentatively fixed and the cost as limited to the audit of the books.

The Reporter's statement of the case:

Mr. John M. Woolsey for the plaintiff. *Messrs. Cletus Keating* and *Delbert M. Tibbetts* were on the briefs.

Mr. Arthur Cobb, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Castner, Curran & Bullitt, Inc., plaintiff herein, is and at all times hereinafter mentioned was a corporation duly created, organized, and existing under and by virtue of the laws of the State of Delaware.

II. On August 3, 1917, the Tidewater Company, a corporation, had with the New York Shipbuilding Company, a corporation, several contracts under which the New York Shipbuilding Company was obligated to construct and deliver five vessels, hereinafter referred to as the steamships *Deepwater*, *Sewall's Point*, *Winding Gulf*, *Glen White*, and *William N. Page*.

III. The United States on August 3, 1917, acting through the United States Shipping Board Emergency Fleet Corporation, and under and by virtue of the act of Congress of June 15, 1917, and Executive order of the President of July 11, 1917, pursuant thereto, requisitioned and acquired title to the steamships mentioned in Finding II, the contracts in relation to their construction, and all materials therefor in the yards of said New York Shipbuilding Company and commitments for material for the vessels. The vessels were completed by the United States for the purpose of placing them in trans-Atlantic service and for the transportation of munitions and supplies for the armies of the United States and its associated powers.

IV. The original plans and specifications under which the vessels were designed provided for vessels especially adapted

to the coastwise coal trade and of a type known as colliers. Vessels constructed wholly in accordance with such original plans would not have been suitable for trans-Atlantic service during the war, and to adapt them for such service the changes in the original plans and specifications set out in Finding V, below, were necessary.

V. Consequent upon the aforesaid requisition an agreement was entered into between the United States and New York Shipbuilding Company pursuant to which the United States ordered and New York Shipbuilding Company undertook, in consideration of the payment to it of all costs, plus an agreed fee, to complete the steamship *Deepwater* in accordance with the original plans and specifications therefor and changes in and additions thereto which would render her suitable for trans-Atlantic service during the war, and all of which were ordered prior to August 3, 1917, by duly authorized agencies of the then owner of said vessel, and, further, to build and complete the steamships *Sewall's Point*, *Winding Gulf*, *Glen White*, and *William N. Page* in accordance with the original plans and specifications therefor, except that there should be incorporated in the structures of said vessels, as in the case of the *Deepwater*, magazines for ammunition, davits for additional lifeboats and rafts and housings therefor, additional lifeboats and rafts, foundations for gun mounts, and deck houses for radio equipment and accommodation of radio operators and gun crews, and so change the original plans, designs, and specifications of said vessels as to permit and provide for the incorporation of the above-mentioned alterations in and additions to the originally designed structures, and to install additional lighting, communication, and signal equipment, and further construct in the steamships *Glen White*, *Winding Gulf*, and *William N. Page* hatches larger than those contemplated by said original plans and specifications, and so change the original plans and designs of the structures of said vessels as to permit and provide for the incorporation of such larger hatches.

VI. All the above-mentioned vessels were completed in accordance with the agreement mentioned in Finding V,

supra, and the total cost of said vessels as completed was $5,400,615.57.

Of the above-mentioned cost the amount of $5,310,120.10 was paid to the New York Shipbuilding Company, included in which is the sum of $537,332.78 expended for the cost of items not provided by the original plans and specifications for the vessels, but which were ordered and provided as set out in Finding V, *supra*, and completed prior to the delivery of the vessels to the United States by the New York Shipbuilding Company.

Also included in the above-mentioned cost of $5,400,615.57 is the sum of $90,495.47 paid by the defendant to parties other than the New York Shipbuilding Company. It does not satisfactorily appear how much of the said sum of $90,495.47 was or was not expended for items provided by the original plans and specifications under which the vessels were designed.

VII. On October 8, 1917, the Tidewater Company executed separate instruments in writing purporting to sell, assign, and transfer to Castner, Curran & Bullitt, Inc., the contracts mentioned in Finding II, *supra*, together with the ships constructed or to be constructed thereunder and, as to the *Deepwater*, *Sewall's Point*, *Winding Gulf*, and *Glen White*, all claims of the Tidewater Company against the United States by reason of the requisitioning of said steamers on August 3, 1917. The provision in regard to assignment of claim against the United States was not contained in the instrument relating to the *William N. Page*.

VIII. During May, 1919, a contract was entered into by and between the United States Shipping Board, acting for and on behalf of the United States, and Castner, Curran & Bullitt, Inc., which consisted of a resolution by the United States Shipping Board offering to sell the steamships *Deepwater*, *Sewall's Point*, *Glen White*, *Winding Gulf*, and *William N. Page* to Castner, Curran & Bullitt, Inc., on the terms mentioned in the said resolution and the acceptance by letter of said offer and resolution by Castner, Curran & Bullitt, Inc., dated May 16, 1919.

Reporter's Statement of the Case

The said resolution of the United States Shipping Board of May, 1919, is as follows:

"Whereas the United States Shipping Board Emergency Fleet Corporation on August 3, 1917, requisitioned title to the steamers *Deepwater*, *Sewall's Point*, *Glen White*, *Winding Gulf*, and *William N. Page*, during construction and subsequently delivered said vessels to the Shipping Board; and

"Whereas Castner, Curran & Bullitt, Inc., has filed a verified claim arising from the requisitioning of the *Deepwater* in the sum of $3,763,375, and a similar verified claim in respect of the *Sewall's Point*, amounting to $1,935,000, and has presented general claims in respect of the *Glen White*, *Winding Gulf*, and *William N. Page;* and

"Whereas the cost to the Fleet Corporation of the completion of said vessels is stated to be the sum of $5,508,000; and

"Whereas Castner, Curran & Bullitt, Inc., and their predecessors in interest, have paid to the New York Shipbuilding Company, the builders of said vessels, and to the Fleet Corporation the sum of $2.908,511.19; and

"Whereas Castner, Curran & Bullitt, Inc., are willing to release their said claims in respect to the requisitioning of said steamships, to pay to the board the further sum of $379,647.81, and to file with the board releases by Castner, Curran & Bullitt, Inc., the Tidewater Company, and Darrow-Mann Company, their predecessors in interest, from all claims arising from the requisitioning of the titles of said steamships by the United States: Now, therefore, be it

"*Resolved*, That the Shipping Board agrees to sell and deliver the steamships *Deepwater*, *Sewall's Point*, *Glen White*, *Winding Gulf*, and *William N. Page* to Castner, Curran & Bullitt, Inc., as of date of May 1st, 1919, upon the further payment to the Shipping Board of the sum of $379,647.81, and upon the filing with the board of the releases by Castner, Curran & Bullitt, Inc., the Tidewater Company, and Darrow-Mann Company of and from all claims by reason of the requisitioning of the titles of said steamships by the United States: And be it further

"*Resolved*, That this board consents to the audit of the books of the New York Shipbuilding Company by Castner, Curran & Bullitt, Inc., for the purpose of ascertaining the actual cost of construction of said vessels, and if such costs are determined to be less than the aforesaid sum of $5,508,000, the difference shall be paid by the comptroller to Castner, Curran & Bullitt, Inc.: And be it further

"*Resolved*, That this board will at its expense cause said steamers to be placed in seaworthy condition, including the repair of any damage received in the service, reasonable wear and tear only excepted; will remove or cause to be removed the gun mounts, emplacements, and otter gear now on the steamers; and will cause the steamers to be restored, where the same have been altered, to the same condition as provided by the plans and specifications under which they were designed, by restoring the frames, decks, beams, hatches, winches, derricks, fittings, etc., to the condition as shown by the original plans of said vessels, and pay demurrage during the incidental detention at not exceeding the rate of requisition hire, provided that said cost of restoring the altered condition of the steamers and demurrage during the period of restoration shall not exceed $50,000 with respect to each ship: And be it further

"*Resolved*, That requisition charters be signed on each of said steamers as of May 1st, 1919, and hire paid to the owners thereunder from said date until released."

Following receipt of a copy of said resolution, plaintiff, through its president, wrote and transmitted to the United States Shipping Board the letter following:

MAY 16, 1919.

The UNITED STATES SHIPPING BOARD:

We accept the terms and conditions of settlement embodied in the board's resolution of May 12th, with respect to the steamers *Deepwater*, *Sewall's Point*, *Winding Gulf*, *Glen White*, and *William N. Page*.

CASTNER, CURRAN & BULLITT, INC.,
By LEMUEL BURROWS, *President*.

IX. On or about May 16, 1919, in pursuance of the contract above mentioned, the plaintiff paid the sum of $379,647.81 in cash, and on or about July 28, 1919, caused to be executed and delivered to the United States Shipping Board the releases mentioned in the said contract. On May 16, 1919, the plaintiff received from the United States bills of sale executed May 12, 1919, and antedated May 1, 1919, transferring and conveying the steamships *Deepwater*, *Sewall's Point*, *Glen White*, *Winding Gulf*, and *William N. Page* to it.

X. On or about July 23, 1919, time-charter parties on a bare-boat basis, known as Requisition Charter, United

States Shipping Board Charter Form No. 2, were signed by both the plaintiff and the United States Shipping Board, being antedated as of May 1, 1919.

XI. After the delivery of the bills of sale conveying the said steamships to the plaintiff, the steamships continued in the service of the United States under the said charters and were delivered to the plaintiff at the following times:

Deepwater	July 30, 1919, 7 a. m.
Sewall's Point	June 12, 1919, 12 noon.
Glen White	July 3, 1919, 7 a. m.
Winding Gulf	May 12, 1919, 12 midnight.
William N. Page	June 19, 1919, 11 a. m.

And the charter hire from May 1, 1919, up to the hour and date of delivery as aforesaid at the rates provided in the several charter parties was paid by the United States to the plaintiff.

XII. In contemplation of and immediately preceding the delivery of said vessels to the plaintiff the United States paid the sum of $101,509.93 to parties other than plaintiff for work, labor, and materials in connection with said vessels. After delivery of the said vessels the United States paid to the plaintiff the sum of $334,739.44 in the following amounts and approximately in the months indicated:

October, 1919	$35, 163. 34
December, 1919	137, 362. 70
January, 1920	56, 000. 00
March, 1920	106, 213. 40
Total	334, 739. 44

The several amounts comprising the said sum of $334,739.44 were estimates by plaintiff and defendant of the amounts necessary to fulfill the obligations of the United States under the said resolution of the Shipping Board of May, 1919, not satisfied by the work, labor, and materials covered by the aforesaid preliminary expenditure of $101,509.93.

The total expenditure thus made by the United States was $436,249.37. It does not satisfactorily appear what proportions thereof, as to all or any one of said vessels, applied to each of the three undertakings of the Shipping Board

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provided for in its said resolution, viz., 1. Placing in seaworthy condition. 2. Removal of gun mounts, emplacements, and otter gear. 3. Restoration to condition as shown by original plans.

There is no satisfactory proof that defendant is entitled to a set-off as claimed in its counterclaim.

XIII. Plaintiff was credited by the Shipping Board with the sum of $5,508,000. This sum was composed of the payment of $379,647.81 (mentioned in Finding IX); of $2,908,511.19, being the sum of $1,175,000, previously paid by plaintiff to the board on account of the purchase of the *Winding Gulf* and *Glen White*, $1,733,509.19, paid to the New York Shipbuilding Co. by plaintiff's predecessors in interest on account of the building of said vessels, and $2.00 error in addition; and of $2,219,841, being an allowance made to plaintiff in lieu of payment of the claim for damages mentioned in the second paragraph of the resolution of the board, Finding VIII, *supra*, and in amount equivalent to charter hire, at regular requisition charter rates, from the several dates of completion of said vessels through April 30, 1919.

XIV. On or about January 12, 1924, a claim for payment of $735,212.68, the amount here prayed for, was presented by plaintiff against the United States before the Shipping Board. After hearing and considering the same, the board by resolution adopted June 10, 1924, denied the claim and set out a counterclaim that plaintiff was over and above all amount due by the United States to plaintiff indebted to the United States in the sum of $85,729.81.

The court decided that plaintiff was entitled to recover $197,879.90.

GRAHAM, *Judge*, delivered the opinion of the court:

On August 3, 1917, the United States Shipping Board requisitioned five certain ships which were under building contracts which the predecessors in title thereto of the plaintiff's had contracted with the New York Shipbuilding Co. to construct. The vessels were finally completed by the Government but no payment for damages in connection with

the requisition of said contracts had been paid to the plaintiff or its predecessors in title prior to the making of the contract hereafter mentioned.

On May 1, 1919, the United States Shipping Board was and for some time prior thereto had been, the owner of five vessels which had been used in the trans-Atlantic trade. The plaintiff desired to purchase them. A contract of sale and purchase was entered into which is embodied in a resolution passed by the United States Shipping Board, the terms and conditions of which were accepted by the plaintiff. It contained the terms of purchase and the settlement of certain matters between the parties (Finding VIII).

Prior to the formal agreement the plaintiff had paid on account of the purchase of these vessels $1,175,000.00.

The plaintiff's predecessors in title had also paid before the contracts for constructing the ships were originally requisitioned in August, 1917, which will be explained later, the sum of $1,733,509.19.

By agreement the amount to be paid for damages incident to the requisition of the contracts, for constructing these vessels originally, was fixed at $2,908,511.19, and cash to be paid at time of purchase at $379,647.81, and an item of $2,219,841.00 was allowed as a credit, all of which sums total $5,508,000, the tentative purchase price.

The plaintiff's predecessors in title had contracts with the New York Shipbuilding Co. for the construction of the five vessels and had paid the amount above named to that company on account of the cost of construction. Before completion the contracts and incompleted vessels were requisitioned on August 3, 1917, by the Shipping Board, under authority of the President. The damages incident to this taking had never been settled or adjusted, and this explains the item above mentioned as allowed in settlement of requisition damages.

Plaintiff on accepting the proposal in the resolution of the Shipping Board, above mentioned, paid the cash amount agreed upon and mentioned above, viz, $379,647.81.

The vessels were at the time said contract was entered into in the service of the Shipping Board, and charters for hire

to the Shipping Board at a certain fixed rate for each were executed after the said sale, it being agreed that the Shipping Board should pay for the use of the vessels until they were delivered to the plaintiff under the contract of sale. This hire for each of the vessels was paid and each of the vessels delivered, the last on the 30th of July, 1919.

Up to this point there seem to have been no differences. The said resolution which was accepted by the plaintiff (Finding VIII) contained the provisions out of which this litigation sprang, and these will now be considered.

One of the recitals of the resolution is as follows:

"Whereas the cost to the Fleet Corporation of the completion of said vessels is stated to be the sum of $5,508,000."

The second resolution is as follows:

"That this board consents to the audit of the books of the New York Shipbuilding Company by Castner, Curran & Bullitt, Inc., for the purpose of ascertaining the actual cost of construction of said vessels, and if such costs are determined to be less than the aforesaid sum of $5,508,000, the difference shall be paid by the comptroller to Castner, Curran & Bullitt, Inc."

This audit of the books of the New York Shipbuilding Co. was made. It showed, according to the said books, the cost to be $5,310,120.10, which leaves a balance as against the tentative price of $5,508,000, of $197,879.90. It also appears from the findings that in addition to the cost thus shown, the board had expended on construction $90,495.47 after the delivery of the vessels by the New York Shipbuilding Company to the board. But as to this latter sum there is a dispute growing out of the contention of plaintiff that the contemplated cost under said resolution was confined to what the books of the New York Shipbuilding Co. showed as the cost of construction, and that the said expenditure of $90,495.47 after delivery should not be considered. With this contention we agree. The objection of the plaintiff to this last amount being taken as part of the actual cost of the vessels under the terms of the contract in working out the settlement must be sustained.

The next claim that the plaintiff urges grows out of the following facts: After the Shipping Board had requisitioned

the vessels it made certain changes and alterations to them, such as equipping them for gun mounts and changing the arrangements of the vessels in various ways. The plaintiff's contention is that when it made the purchase of these vessels it was the intention of the parties and the purpose of the contract that the cost which it was to pay and which was to be shown by the books of the New York Shipbuilding Co. was the cost of construction according to the original plans and specifications, and that the additional cost incident to altering and changing the vessels should not be taken into account as part of the cost under the terms of the contract and credited to the defendant.

It is not necessary to go into a detailed discussion of the different items of cost of changes which make up this claim. It is what the plaintiff calls the amount expended on war equipment for the five vessels and amounts to $351,979.31. To allow this claim would require a very strained construction of the contract and make it necessary to read into it a meaning which is not to be found in its wording, nor, as we think, within its general purpose and intent. The Shipping Board had these vessels in the condition in which they then were and sold them to the plaintiff as they were with the obligation to make certain changes, which will be discussed later. There is nothing in the wording of the contract that can fairly be taken to mean that the parties had any other intention in view. The plaintiff bought the vessels as they stood and the Shipping Board agreed to make certain specified changes, alterations, and removals for the purpose of making them conform to the original plans and specifications, which appears from the following paragraph of the said contract resolution:

"That this board will at its expense cause said steamers to be placed in seaworthy condition, including the repair of any damage received in the service, reasonable wear and tear only excepted; will remove or cause to be removed the gun mounts, emplacements, and otter gear now on the steamers; and will cause the steamers to be restored, where the same have been altered, to the same condition as provided by the plans and specifications under which they were designed by restoring the frames, decks, beams, hatches, winches, derricks, fittings, etc., to the condition as shown by the original

plans of said vessels, and pay demurrage during the incidental detention at not exceeding the rate of requisition hire, provided that said cost of restoring the altered condition of the steamers and demurrage during the period of restoration shall not exceed $50,000 with respect to each ship."

It is clear from this paragraph that the plaintiff purchased these vessels as they were, subject only to the obligations of the Shipping Board to comply with the requirements of this resolution, and this the Shipping Board not only did but, according to its claim, it overdid and paid to the plaintiff certain amounts over and above the fifty thousand dollar-limit on each vessel named, and this overpayment it is seeking to recover as a counterclaim. We therefore hold that plaintiff can not recover on this last item of its claim.

We now come to the defendant's counterclaim. It will be observed that the resolution last quoted deals with a number of matters as to which the defendant was to make an expenditure. They are separated by semicolons and they are distinct items, differing in character each from the other, and it is only as to the last, commencing "and will cause the steamers to be restored," etc., that the limit of $50,000 as to each vessel seems to apply, and this is understandable when it is seen that the things to be done under this last enumeration are of a general character; for instance, to cause the vessels to be restored, where the same have been altered, to the same condition as provided in the plans and specifications, etc., and it does not appear that the expenditure in this last enumeration was any more than $50,000 in the case of each vessel.

It will be seen that the last-quoted extract from the resolution covered an obligation of the Government, first, at its own expense to recondition these ships, ordinary wear and tear excepted; second, to cause the gun mounts, emplacements, and otter gear on them at the time to be removed at its own expense; third, at its own expense to restore the ships, where they had been altered, to the condition provided in the plans and specifications under which they were designed; and fourth, that the "cost of restoring the altered condition of the steamers and demurrage during the period

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of restoration shall not exceed $50,000 with respect to each ship."

But aside from this, the court has found that it does not appear what proportion of the sum paid to the defendant was applied to all or any of said vessels, or how much was applied for each of the three purposes above named, viz, placing in seaworthy condition, removal of gun mounts, restoration of condition. Judgment should be entered for plaintiff for the amount due it on the difference between the estimated cost of the vessels and the amount found due by the audit of the New York Shipbuilding Company's books as heretofore stated, in the sum of $197,879.90, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

ALPHA PORTLAND CEMENT CO. v. THE UNITED STATES

[No. J-156. Decided May 13, 1929]

On the Proofs

Income and profits taxes; accrual basis; lease of cement bags; payments for nonreturn; proportion to be treated as income.—The plaintiff, a cement company, by contract with its customers, retained title to its cement bags, leasing them thereto at a specified charge, and agreed to refund to the purchaser, upon the required return of the bags, so much per bag. In the event of disposal of any of the bags to another person the purchaser agreed to pay the owner, as liquidated damages, a designated sum for every bag so disposed of. Upon sale of the cement the plaintiff credited its bag inventory with the value of the bag, charged the customer with the agreed amount of refund and credited or charged an account styled "Return-bag liability," as the case might be, with the difference, if any. When the bag was returned, the entry was reversed. Plaintiff kept its accounts and made its income and profits tax return on the accrual basis. *Held*, that in computation of the tax only so much of an increase in the "Return-bag liability" should be

treated as income as represented the proportion that the company's experience and that of others in the industry showed would be returned in due course of business during the taxable year.

The Reporter's statement of the case:

Porter & Taylor for the plaintiff.

Messrs. Lisle A. Smith and *Lester L. Gibson*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is and at all the times mentioned herein was a New Jersey corporation, engaged in the business of manufacturing and selling Portland cement.

During the year 1918 the La Salle Portland Cement Company, formerly named German-American Portland Cement Works, was an Illinois corporation engaged in the same business.

II. On or about October 15th, 1919, the La Salle Portland Cement Company filed a return for its income and excess-profits taxes for the calendar year 1918, as required by the revenue act of 1918, and paid the taxes shown due thereon in the amount of $24,027.88.

III. On November 30th, 1920, plaintiff purchased the cement mill and all the assets formerly belonging to the La Salle Portland Cement Company and assumed its liabilities, including its liabilities for taxes. La Salle Portland Cement Company was thereafter legally dissolved.

IV. On June 12th, 1925, the Commissioner of Internal Revenue proposed an additional assessment against the La Salle Portland Cement Company of $26,456.19 for income and excess-profits taxes for the year 1918. The said proposed additional tax was based on a determination of the company's net income of $169,177.00, and the excess-profits tax was determined by special assessment under section 328 of the revenue act of 1918 at 20.44 per cent of the company's net income.

V. Plaintiff, as the then owner of the La Salle Portland Cement Company's properties, and the real party in interest

because of its responsibility for said tax liability, appealed to the United States Board of Tax Appeals from such proposed assessment. The plaintiff in the said appeal raised the identical claim made in the present suit.

VI. The actual submission of the said appeal to the United States Board of Tax Appeals was made at a hearing before said board on January 26th, 1926, and prior to the passage of the 1926 revenue act. On July 27th, 1926, the United States Board of Tax Appeals decided said appeal, 4 B. T. A. 438, and while granting certain relief to the plaintiff on other points, denied any relief in respect to matters involved in the present claim.

VII. In accordance with the said decision, the Commissioner of Internal Revenue redetermined the net income of the La Salle Portland Cement Company at $167,197.09, calculating its excess-profits tax at the rate of 20.44 per cent of its net income, and determined additional income and excess-profits taxes due for the year 1918 at $25,861.01, and assessed said amount against the La Salle Portland Cement Company.

VIII. Plaintiff received a notice of said assessment, to which interest of $2,153.90 had been added and a credit for $149.37 given, making a total demanded of $27,865.54, which amount was duly paid by the plaintiff on September 2nd, 1927.

IX. On September 14th, 1927, plaintiff filed a claim for refund of said payment, based on the same matters raised in this suit. Said claim for refund was denied by the Commissioner of Internal Revenue on March 1st, 1928, and the petition herein was subsequently filed.

X. La Salle Portland Cement Company, for the period in question, kept its books and made its returns on the basis of accruals.

XI. La Salle Portland Cement Company sold large quantities of Portland cement shipped to its customers packed in cotton bags, which bags bore the company's name and its trade-mark or brand, and were suitable for repacking and reuse. In the year 1918 it shipped 3,122,156 such bags to its customers.

XII. All the contracts of the La Salle Portland Cement Company for products so shipped during the year 1918 were in a standard form, except that the amount agreed to be refunded for bags in the contract was 10¢ for the period prior to September 16th, 1918, and 25¢ for the rest of the year; such increase being made in accordance with notice sent to customers. The cement bags shipped out under contracts which contained definite refund clauses in different amounts were conspicuously marked, so that the fact as to whether they were 10¢ or 25¢ bags could be readily ascertained by observation.

The following is the provision in said standard form of contract, with reference to the refund on the bags:

"Cloth sacks bearing 'Owl' brand, in which cement herein contracted for is packed, are the property of cement company, and are for a period of ninety (90) days from the delivery by cement company of the said cement, leased by it to purchaser at a charge of ——— cents each, which charge is included in price for cement packed in cloth sacks, and which charge purchaser agrees to pay at same time and on same terms as payment for cement is made.

"Purchaser agrees within ninety (90) days of delivery of the cement to deliver to cement company (the owner, at its plant at La Salle, Ill., freight prepaid, properly bundled and so marked as to insure complete identification, the sacks bearing 'Owl' brand in which said cement is packed, and cement company agrees to refund to purchaser ——— cents for each said sack so delivered in good condition, subject to its count and inspection.

"For useless sacks, or sacks which have been wet, no refund will be made. Foreign sacks will be held by cement company for thirty (30) days subject to purchaser's order.

"In the event that any of the said empty sacks bearing 'Owl' brand are sold or otherwise disposed of to any person other than cement company, the owner, purchaser agrees to pay cement company, as liquidated damages, ten (10) cents for each sack so sold or disposed of."

XIII. During the year 1918 La Salle Portland Cement Company carried its cement bags in its inventory at 12.45¢ each.

The amounts inserted in the contracts for refund on the return of bags were arbitrarily fixed, and had no relation to the actual cost of the bag.

XIV. The La Salle Portland Cement Company had special facilities and equipment for the repair and cleaning of bags. The expense of the bag department for the year 1918 amounted to a considerable sum. Dealers in cement did not ordinarily have any equipment for cleaning or handling bags.

XV. During the year 1918, 3,122,156 cotton bags were shipped out by the La Salle Portland Cement Company; 2,984,737 bags so shipped out were returned and redeemed, making a percentage of 95.6% of the bags shipped out returned and redeemed in the same year. During the period from April 30, 1913, to December 31, 1918, the La Salle Portland Cement Company shipped out 19,199,956 bags, and of these 17,014,485 were returned and redeemed during the same period, or a percentage of 89.9%.

XVI. It is the custom for cement manufacturers to sell their cement packed in cotton bags, with the agreement to redeem or repurchase the bags when they are returned in good condition. The Alpha Portland Cement Company, over a period of 22 years, redeemed 89.62 per cent of the bags shipped out by it.

The Portland Cement Association in 1918 investigated the question of the percentage of cement bags shipped out by its members which were returned to the shippers and redeemed by them during the years 1915, 1916, and 1917. Such investigation involved an annual flow of 230,000,000 bags. The report made by the association stated that in the district in which the La Salle Portland Cement Company was located 91% of the bags shipped out by its members in 1915 were returned and redeemed, 90% in 1916, and 91% in 1917. That for the whole United States, 89% of the bags shipped out were redeemed in 1915; 85% in 1916; and 88% in 1917.

XVII. When the cement was shipped in cotton bags, La Salle Portland Cement Company charged to the customer the amount of the refund specified for the bag in the contract for the purchase of the cement. It credited the bag inventory with 12.45¢, the inventory value of the bag. The difference between the amount charged to the customer

for the bag and the credit on the bag inventory was credited or charged, depending on whether it was greater or less, in an account known as "Return-bag liability." When the bag was returned, the entry was reversed.

XVIII. On December 31st, 1917, the amount of the "Return-bag liability" account of the La Salle Portland Cement Company was $12,294.69. On December 31st, 1918, it was $54,253.98, or an increase in the amount for the year of $41,959.29. In making its return for income and excess-profits taxes for 1918 the company did not include as a part of its net income the amount of the "Return-bag liability."

XIX. In determining the net income of the La Salle Portland Cement Company for 1918 at $167,197.09, the Commissioner of Internal Revenue included therein said sum of $41,959.29, representing the increase in the "Return-bag liability" account during the year.

The court decided that plaintiff was entitled to recover $11,324.17, with interest from September 2, 1927.

SINNOTT, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover $11,324.17 income and excess-profits tax for the calendar year 1918. The amount claimed is part of an additional assessment made against the La Salle Portland Cement Company, an Illinois corporation, and paid by plaintiff on September 2, 1927.

On November 30, 1920, plaintiff purchased the assets of the La Salle Portland Cement Company, and assumed its obligations. The said La Salle Portland Cement Company (hereafter referred to as the company) was, in 1918, engaged in the manufacture and sale of Portland cement. A large quantity of the cement sold was shipped to customers, packed in cotton bags, which were suitable for repacking and reuse. The company sold its cement under a standard form of contract, the material provisions of which are set forth in Finding XII, and provide that the bags in which the cement is packed "are the property of the cement company," and for a period of 90 days are leased to the customer at a charge of definite amounts. The pur-

chaser agrees to return the bags within 90 days to the company and the company agrees to refund to a customer the full amount of the bag charge for each bag returned in good condition. The customer agrees to pay a penalty to the company for each bag sold or disposed of to any person other than the company.

For all shipments made between January 1, 1918, and September 16, 1918, the charge for the bag, and the amount of refund which the company agreed to pay on the bag's return was 10 cents. For all shipments made between September 16, 1918, and December 31, 1918, the amount was 25 cents. The bags were clearly marked so that the bags shipped out at 10 cents could be distinguished from those shipped at 25 cents.

During 1918 the bags were carried in the company's inventories at 12.45 cents each. In order to record the receipt of the charge for the bag, the withdrawal of the bag from inventory, and the obligation to refund on the return of the bag, the company used the method of accounting which gives rise to the matter here in controversy. At the time of shipment the company charged its customer with the amount of the charge agreed on in the contract for the bags. At the same time it credited its inventory account with the value of the bag. If the amount of the bag deposit was greater than the value of the bag, the excess was credited to an account known as "Return-bag liability." If the deposit was less than the value, the difference was charged to this account. When the bag was returned the entry was reversed. The "Return-bag liability" accordingly rose and fell from day to day, depending upon the flow of bags in and out, and was affected by the increase of the deposit made for shipments after September 16th, when the amount specified for the bags was changed from 10 to 25 cents.

On January 1, 1918, the "Return-bag liability" of the company was $12,494.69. On December 31, 1918, it was $54,253.98. The company during the period in question kept its books on an accrual basis, and made its return of income for 1918 on that basis. It did not include the

increase in its "Return-bag liability" occurring during 1918 as income for that year.

The Commissioner of Internal Revenue, in auditing the 1918 returns, added to the company's net income the sum of $41,959.29, representing the increase in the "Return-bag liability" during 1918. This action of the commissioner is questioned in the present case.

During the year 1918 the company shipped out 3,122,156 bags and redeemed 2,984,737, or 95.6%. For the period from April, 1913, to December 31, 1918, the company shipped out 19,199,956 bags and redeemed 17,014,485, or 89.9%.

A similar practice in regard to cement bags is customary in the industry. The plaintiff, over a period of twenty-two years, redeemed 89.62% of the bags shipped out by it. From Finding XVI it appears from the investigation of the Portland Cement Association that in the district in which the company was located for the three years preceding 1918, approximately 90% of the two hundred thirty million bags shipped out annually by members of the association were returned by the customers.

The question before us is whether the Commissioner of Internal Revenue was correct in considering the company's "Return-bag liability" of $41,959.29 as income, accruing to the company in 1918.

The plaintiff contends that the commissioner erred in considering the entire amount of the increase in the "Return-bag liability" as income for the year 1918. We agree with the plaintiff's contention.

The company kept its books on an accrual basis, in accordance with section 212 (b) of the revenue act of 1918, 40 Stat. 1064, as follows:

"(b) The net income shall be computed * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; * * * or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the commissioner does clearly reflect the income * * *."

It seems clear that the company's method of bookkeeping was calculated clearly to reflect its income, and was within

the intent of said section 212 (b). On the other hand, it is clear that the commissioner's method does not reflect but distorts the company's income. The company's method of accounting for its bags provides a necessary and proper consideration of its contractual obligation to refund the charges for the bags made at the time of shipment.

This obligation was a legal liability, the amount of which was readily ascertainable, for the company's experience, and that of others in the industry, was that 90% of bags outstanding at the end of 1918 would be returned in the due course of its business.

In view of the above, it is apparent that to treat more than 10% of plaintiff's "Return-bag liability" of $41,959.29 as income, would be a plain distortion of plaintiff's income for the year 1918, because 90% of the above amount, which sum the experience of the trade shows must be refunded, is "properly attributable to the process" of earning income during that period.

The Supreme Court in considering section 13 (d) of the revenue act of 1916, 39 Stat. 771, from which section 212 (b) *supra*, is derived, said in *United States* v. *Anderson*, 269 U. S. 422, 440:

"It was to enable taxpayers to keep their books and make their returns according to scientific accounting principles, by charging against income earned during the taxable period, the expenses incurred in and properly attributable to the process of earning income during that period; and indeed, to require the tax return to be made on that basis, if the taxpayer failed or was unable to make the return on a strict receipts and disbursements basis."

In *United States* v. *Anderson*, *supra*, the taxpayer at the end of 1916 set up a reserve to meet the munitions tax on that year's production. The munitions tax was passed in the fall of 1916, but was not payable until the succeeding year. Its amount was only determinable after audit by the commissioner. In the strict legal sense it did not accrue until due. The Supreme Court said:

"The appellee's true income for the year 1916 could not have been determined without deducting from its gross in-

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come for the year the total cost and expenses attributable to the production of that income during the year. The reserve for munitions taxes set up on its books for 1916 must have been deducted from receivables for munitions sold in that year before the net results of the operations for the year could be ascertained. The taxpayer * * * could not have complied with par. 13 (d) and Treasury Decision 2433 by deducting either accruals of interest or expenses alone without the other, or without deducting other reserves made on its books to meet liabilities such as the munitions tax, incurred in the process of creating income.

"Only a word need be said with reference to the contention that the tax upon munitions manufactured and sold in 1916 did not accrue until 1917. In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it. In this respect, for purposes of accounting and of ascertaining true income for a given accounting period, the munitions tax here in question did not stand on any different footing than other accrued expenses appearing on appellee's books. In the economic and bookkeeping sense with which the statute and Treasury decision were concerned, the taxes had accrued. It should be noted that paragraph 13 (d) makes no use of the words 'accrue' or 'accrual' but merely provides for a return upon the basis upon which the taxpayer's accounts are kept, if it reflects income—which is precisely the return insisted upon by the Government."

We may say almost in the language quoted above, that plaintiff's income for the year 1918 could not have been determined without deducting from its gross income for the year the expenses attributable to its "Return-bag liability."

The doctrine announced in *United States* v. *Anderson*, *supra*, was followed in *American National Co.* v. *United States*, 274 U. S. 99.

The American National Co. made loans secured by mortgages on notes due in five years, with the privilege of anticipation. At the time the loan was made the borrower gave the company another note for its fee. The company sold the loan notes and, as an inducement, contracted with pur-

chasers thereof to pay a bonus of 1 per cent per annum in addition to the interest shown on the loan notes.

When the company sold a loan note it charged as an expense on its books the aggregate amount of payments called for in the bonus contract and credited the purchaser with a similar amount in an account known as a " Guarantee fund " account.

If a loan note was anticipated, the difference between the amount of bonus contract which had been credited to the purchaser and the payments already made was credited to profit and loss in that year.

The Commissioner of Internal Revenue disallowed the claim of the company for the deduction of the total amount of bonus contracts made in 1917, claiming that it should be allowed to deduct only so much thereof as came due during that year.

The court, following *United States* v. *Anderson*, *supra*, held that the " Guarantee fund " was a proper deduction in the year the entries were made:

" The company's net income for the year could not have been rightly determined without deducting from the gross income represented by the commission notes the obligations which it incurred under the bonus contracts, and would not have been accurately shown by keeping its books or making its return on the basis of actual receipts and disbursements. The method which it adopted clearly reflected the true income. And, just as the aggregate amount of the commission notes was properly included in its gross income for the year—although not due and payable until the expiration of two years—so, under the doctrine of the *Anderson* case, the total amount of the bonus contracts was deductible as an expense incurred within the year, although it did not 'accrue' in that year, in the sense of becoming then due and payable."

In *American Code Co.* v. *Commissioner*, 30 Fed. (2d) 222, the taxpayer discharged an employee in 1919. The employee was entitled to certain commissions not settled or determined at that time. The company knew of its obligations and during 1919 set up a reserve on its books of $14,000. The company kept its books and made its income-tax return on

the accrual basis. In 1921, after suit by the employee, the amount was determined by verdict at $21,000. The question arose as to the right of the taxpayer to take a deduction in 1919 for this liability. The circuit court of appeals, in sustaining this right, said:

"While the amount of the appellant's liability was not ascertained until a future year, we think that the loss was sustained when the contract was broken and must be considered before the income of that year can be determined. When books are kept on an accrual basis estimated reserves for unliquidated liabilities must necessarily be used."

Reference is made in Findings V and VI to the claim herein involved having been decided adversely to plaintiff's contention by the United States Board of Tax Appeals, 4 B. T. A. 438. That case was tried on the theory of the sale of the bag to the customer and an agreement to buy back the bag. The record before the Board of Tax Appeals differs from the present record in that it does not appear that the board had before it the actual contract used in the transaction, and was not advised that the company specifically retained title to the bag, and did not sell it, but leased the bag. Nor was the case considered from the standpoint of section 212 (b), *supra*. This is shown in the case of *La Salle Cement Co.* and *Alpha Portland Cement Co.*, 15 B. T. A. 1127, involving the identical refund-bag provision set forth in Finding XII.

The Board of Tax Appeals in said case, referring to the decision in 4 B. T. A. 438, said:

"The present case is presented upon a different state of facts and a different theory and this prior decision is not, as counsel for the respondent contends, decisive of the question before us. From the facts in that case it appeared that the petitioner there sold its bags with an agreement to repurchase at the sales price when returned. The sales price, although arbitrarily fixed, was substantially the same as cost. The question presented by that state of facts was whether any deduction could be taken by reason of the obligation to repurchase the bags. Here the evidence is that the petitioner did not sell its bags. The form of the transaction was a lease, petitioner retaining title, with provision

for liquidated damage in the event that the bags were not returned."

In the above-cited case from 15 B. T. A., the commissioner treated the "Bag redemption" account as he did in the present case as showing income. The Board of Tax Appeals held this to be incorrect, saying:

"We conclude that the method used by respondent, while it may be correct in principle when properly applied, does not correctly reflect the income of petitioners for the years before us. On the contrary it seriously distorts the true income. * * * Had the present taxpayers in their financial statements considered the charges for bag deposits outstanding May 31, 1920, as income received the preceding year, they 'would have given to their stockholders and the public a false idea of their income.'"

The board after pointing out that "experience showed that 10.1% of the sacks sent out would never be returned" said, referring to the "Bag redemption" acount:

"We are consequently of the opinion that the income of petitioners will be reflected by including as income for each of the taxable periods 10.1% of the amount so credited to this account during the year."

The decision in 15 B. T. A., while it involves the fiscal years ending May 31, 1920, and November 30, 1920, involves a bag-refund provision exactly identical with the one in the present case.

We therefore conclude that only 10% of the $41,959.29 in plaintiff's "Return-bag liability" account on December 31, 1918, reflects plaintiff's income for that year, and that plaintiff is entitled to recover the sum of $11,324.17, with interest. It is so ordered.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

NILES BEMENT POND CO *v.* THE UNITED STATES[1]

[No. E-177. Decided May 13, 1929]

On the Proofs

Income and profits taxes; cash and accrual bases; inconsistent bookkeeping; departmental ruling; burden of proof.—Where only a relatively small part of a taxpayer's accounts is kept on a cash basis, the general plan of bookkeeping being based on accruals, the tax returns should be made on the accrual basis, and a ruling of the Commissioner of Internal Revenue in a particular case to that effect must be overcome by proof that the books were not so kept.

Same; purchase of stock at market; deduction from par; difference as earned surplus.—Where a company purchases shares of stock at their actual value, which is less than par, deducts the purchase price from the par value and treats the difference as earned surplus, a decrease by the Commissioner of Internal Revenue of the invested capital in the amount of the said difference, for the purpose of computing income and profits taxes, was justified and proper.

The Reporter's statement of the case:

Mr. Karl D. Loos for the plaintiff. *Messrs. E. Barrett Prettyman* and *Preston B. Kavanagh*, and *Butler, Lamb, Foster & Pope* were on the briefs.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Ottamar Hamele* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff, Niles Bement Pond Company, is and at all times since 1900 has been, a New Jersey corporation, with its principal place of business at New York City, and was throughout said period engaged in the business of manufacturing machine tools and selling such products in the various States of the United States, and in Great Britain and other parts of the world.

II. Plaintiff seasonably filed in proper form, Federal tax returns for the calendar years 1917, 1918, and 1919. Subsequent to the filing of the respective returns, the income and

[1] Certiorari granted.

Reporter's Statement of the Case

profits tax liability of plaintiff was determined and assessed for the year 1917 at $271,505.16; for the year 1918 at $1,-719,644.93 and for the year 1919 at $323,177.92.

III. The total net payments of Federal income and profits taxes were made by plaintiff in the amounts and on the dates as follows:

1917:		
Paid June 6, 1918	$271, 505. 16	
1918:		
Niles Bement Pond Co. of Massachusetts—		
Paid Mar. 30, 1919	13, 750. 00	
June 17, 1919	13, 750. 00	
Sept. 11, 1919	13, 750. 00	
Dec. 17, 1919	13, 750. 00	
		$55, 000. 00
Niles Bement Pond Co.—		
Paid Mar. 30, 1919	662, 500. 00	
June 17, 1919	662, 500. 00	
Oct. 31, 1919	129, 608. 61	
Dec. 18, 1919	210, 036. 32	
		1, 664, 644. 93
Total amount of tax shown to be due and paid		1, 719, 644. 93
1919:		
Paid Mar. 31, 1920	$125, 000. 00	
June 26, 1920	125, 000. 00	
Sept. 15, 1920	55, 557. 49	
Dec. 15, 1920	17, 620. 43	
Total amount of tax shown to be due and paid		$323, 177. 92

IV. Claims for refund for the years 1917, 1918, and 1919 were seasonably filed and were rejected on or about September 22, 1924.

V. Plaintiff during the year 1918 paid to the Government of Great Britain the sum of $4,488.72 representing income taxes for the year beginning April 6, 1917, and ending April 5, 1918, paid on income derived from sources within Great Britain, and no part of said amount was ever refunded to plaintiff. During the year 1918 plaintiff also paid to the Government of Great Britain the sum of $44,-126.40 representing excess-profits duty for the accounting period ended December 31, 1916, paid on income derived from sources within Great Britain.

VI. Said amounts of $44,126.40 and $4,488.72, totalling $48,615.12, were claimed as a credit on the plaintiff's income and profits tax return for the calendar year 1918, said credit being claimed under section 238 of the revenue act of 1918. The tax paid by plaintiff for the year 1918 was computed and determined without the allowance of said amount, or any part thereof as a credit.

VII. Subsequent to the filing of the return for 1918, plaintiff received from the Government of Great Britain a net refund of $12,537.53, reducing the payment of British excess-profits tax to a net amount of $31,588.87.

VIII. The British income tax aforesaid was paid to the British Government pursuant to a notice dated January 24, 1918. The British excess-profits duty aforesaid was paid pursuant to a " Notice of assessment and notice to pay duty," dated January 19, 1918. Said notices were the first notice, assessment, demand, or information received by plaintiff as to the amount of the income tax and excess-profits duty, respectively, so payable. The returns annually made by plaintiff to the British Government relating to income taxes and excess-profits duty contained no computation of the taxes; they contained only a report of income. Plaintiff in making its return of income did not attach any statement showing computation of the amount of the excess-profits duty payable by it for the accounting period ended December 31, 1916, or of the income tax for the year ending April 5, 1918.

IX. Under the method of accounting regularly employed by plaintiff in keeping its books throughout the year 1918, the accounting for expenses of the London office was on a cash disbursements basis and no accruals were made for any such expenses in advance of their payment.

X. The British taxes paid in 1918 were expenses of plaintiff's London office and were entered on the plaintiff's books of account at the time of payment in 1918 in accordance with the method of accounting regularly employed in keeping plaintiff's books.

XI. British income tax in the amount of $10,321.92 for the year beginning April 6, 1918, and ending April 5, 1919, paid

by plaintiff in 1919 was claimed as a credit on plaintiff's 1919 return and was allowed as such credit under section 238 (a) of the revenue act of 1918. British income tax in the amount of $1,696.20 for the year beginning April 6, 1919, and ending April 5, 1920, was paid by plaintiff in 1924. No claim for credit was filed by plaintiff for 1920, nor was any such credit allowed; and no claim for credit was made in 1924, the plaintiff's return for that year showing a net loss and no tax due.

During the years 1916, 1917, 1918, and 1919, the books of the plaintiff were kept on the accrual basis. There were some exceptions in small items of deferred charges and credits in the plaintiff's accounts where the cash basis was reflected, but notwithstanding this the principal and dominant purpose and plan of its accounts were to show income upon an accrual basis as the general and controlling character of the accounts.

Plaintiff's corporation income-tax return for the year 1916, its corporation income-tax return and its excess-profits tax return for the year 1917, and its corporation income and profits tax returns for the years 1918 and 1919 were filed on the accrual basis.

The British income taxes paid by plaintiff in the year 1918 were assessed on account of income received in the years 1914, 1915, and 1916. The Commissioner of Internal Revenue allowed plaintiff deductions prior to 1918 for all of the British taxes in dispute. These taxes were based upon tax returns made by plaintiff prior to 1918.

XII. During all three of the calendar years 1917, 1918, and 1919 plaintiff owned 15,250 shares of the common stock of Pratt & Whitney Company, a corporation organized under the laws of the State of New Jersey.

XIII. Said stock was acquired by plaintiff in the year 1901 in the following manner:

In the year 1900, or shortly prior thereto, the then directors of the Pratt & Whitney Company determined that a reorganization and refinancing of that company was necessary. After extensive negotiations arrangements were completed whereby the plaintiff undertook to formulate and

execute such a plan of reorganization and refinancing. Among the conditions involved in this plan as finally agreed upon between the two companies was that the plaintiff should take over and assume the management of the Pratt & Whitney Company; that plaintiff should guarantee the dividends on the preferred stock of said Pratt & Whitney Company, and that the plaintiff should receive 15,250 shares of the common stock of the Pratt & Whitney Company, which were to be transferred to it by the former common stockholders of the Pratt & Whitney Company upon the payment to them of $10.00 cash per share. The total cash paid under this plan was $154,420.94. This plan was carried out during the year 1901 and the plaintiff thus acquired the said 15,250 shares of Pratt & Whitney common stock.

XIV. The following contract was executed under date of July 9, 1900, and was thereafter performed substantially in accordance with its terms.

PARTIES.

Memorandum of Agreement entered into this ninth day of July, 1900, by and between the firm or co-partnership of *Cuyler, Morgan and Company*, of New York City, hereinafter called the first party, and Niles-Bement-Pond Company, hereinafter called the second party.

PURPOSE.

Whereas the first party has been requested to reorganize in New Jersey the Pratt & Whitney Company, a Connecticut corporation, in such manner that its present preferred stockholders shall receive from the corporation as reorganized, preferred stock equal, in par value, to 70% of the par value of their present holdings of preferred stock—that is, 12,250 shares of the preferred stock of the reorganized corporation, of the par value of $1,225,000, which shall constitute its entire issue of preferred stock, together with common stock of the reorganized corporation equal, in par value, to 30% of the par value of their present holdings of preferred stock—that is, 5,250 shares of the common stock of the reorganized corporation—of the par value of $525,000; and in such manner, further, that the present common stockholders of the Pratt & Whitney Co. shall receive from the corporation, as reorganized, common stock equal, in par value, to the par value of their present holdings of common stock; that is, 10,000 shares of the common stock of the reorganized corporation, of the par value of $1,000,000;

and *Whereas* the second party is desirous of acquiring and holding, when issued, the entire common stock of the reorganized corporation, that is, 15,250 shares of the par value of $1,525,000; all of which, will hereinafter more fully appear;

CONSIDERATION.

Now, therefore, this agreement witnesseth, that the parties hereto, for and in consideration of the sum of one dollar by each to the other in hand paid, the receipt whereof is hereby acknowledged, as well as in consideration of the mutual covenants and promises herein contained, do covenant and agree as follows:

ORGANIZATION OF PROPOSED CORPORATION.

First: The first party does covenant and agree to use its best endeavors and efforts to organize within thirty days after the date hereof, under the laws of New Jersey, a corporation, to be named "Pratt & Whitney Company," of perpetual existence, with a total authorized capital stock of $2.750,000 par value, divided into 12,250 shares of preferred and 15,250 shares of common stock of the par value of $100 each; which preferred stock shall be preferential both as to assets and dividends, which dividends shall be cumulative and payable quarterly at the rate of 6% per annum, and which preferred stock may be redeemed at par, plus accrued dividends, if any, by vote of a majority of the directors of said Pratt & Whitney Company, upon the first Monday of January, 1911, upon six months' notice by the said corporation to the holders thereof; and to procure all said stock, preferred and common, to be issued fully paid and nonassessable; that said Pratt & Whitney Company, if incorporated, to be organized in such manner that its real and personal property or either shall not be mortgaged except upon the consent in writing first obtained of the holders of 90% of its preferred stock issued and outstanding.

PROPERTY THEREOF.

Second: The first party does further covenant and agree to use its best efforts and endeavors to procure the said proposed Pratt & Whitney Company, immediately upon its organization as aforesaid, to take over and acquire, from the Pratt & Whitney Company, a Connecticut corporation, as of January 1, 1900, the entire plant and business, and all real and personal assets of the latter as a going concern, and to assume its liabilities as of that date, all such assets and lia-

bilities to be as shown in the balance sheet of said the Pratt & Whitney Company of the date mentioned, a copy whereof is hereunto annexed and made a part of this agreement; the said plant and business, assets and liabilities, to remain, between said January 1, 1900, and the date of actual transfer to the proposed Pratt & Whitney Company, and at the latter date to be, the same as shown in the said balance sheet, subject only, during such interval, to the fluctuations incident to the ordinary conduct by the present the Pratt & Whitney Company of the business of manufacturing and selling the regular products of its factory; and the said plant, business, and assets, as of the said January 1, 1900, if acquired by the proposed Pratt & Whitney Company, to be free and clear of all liabilities except those set forth in said balance sheet; and in the event of the said plant, business, and assets of the Pratt & Whitney Company being acquired by the proposed Pratt & Whitney Company, no dividends, accrued, credited, or declared upon the preferred or common stock of the present the Pratt & Whitney Company on or before January 1, 1900, to be deemed a liability of the said company, and all stockholders of the present the Pratt & Whitney Company, in writing, prior to the transfer herein contemplated, expressly to waive all right to such dividends, if any; and no dividends to have been or be declared, credited, or paid upon the said preferred or common stock subsequently to said January 1, 1900, and all stockholders of the present the Pratt & Whitney Company, in writing, and prior to the transfer herein contemplated, expressly to waive all right to such dividends, if any.

EXPENSES OF ORGANIZATION.

Third: It is understood and agreed by the parties hereunto that the organization of said proposed Pratt & Whitney Company shall in all respects be to the satisfaction of the second party, and that all expenses of such organization shall be borne by the proposed Pratt & Whitney Company, provided, however, that no expenses shall be incurred without the consent of the second party.

PURCHASE OF COMMON STOCK.

Fourth: The first party and the second party do hereby covenant and agree that if the proposed Pratt & Whitney Company is organized in precisely the manner and with the property herein set forth, and if the first party shall sell or procure to be sold to the second party, 15,250 shares of the fully paid nonassessable common stock of the said proposed corporation, at $10 per share, cash, immediately when issued,

then that the second party will purchase said 15,250 shares of common stock at said price.

GUARANTY OF PREFERRED STOCK.

Fifth: And the said second party does further agree that if the said Pratt & Whitney Company is organized in exactly the manner and with the property herein set forth, and if the second party shall purchase the said stock, as aforesaid then that it, the second party, shall and will, in consideration of the sale to it of said common stock, enter into a contract of guaranty with the said proposed Pratt & Whitney Company, or the holders of the preferred stock of said proposed Pratt & Whitney Company, or both, that if upon any quarterly dividend day of the said proposed Pratt & Whitney Company its earnings applicable under its charter to dividends shall be insufficient to pay its preferred dividends then due and accumulated, then that it, the second party, shall and will pay to the proposed Pratt & Whitney Company such amount of money as, with the said earnings, if any, of the latter, will enable it to pay its said preferred dividends then due and accumulated, provided that the earnings of the said second party applicable under its charter to dividends shall at such time have been sufficient to enable it to pay all dividends then due and accumulated upon its preferred stock.

WINDING UP.

Sixth: The first party hereby covenants and agrees to recommend to present stockholders immediately after the purchase and sale of the plant and business of the present the Pratt & Whitney Company herein contemplated, to procure the said corporation to be completely and finally dissolved and wound up, according to the laws of the State of Connecticut.

OBLIGATIONS HEREUNDER.

Seventh: It is further understood and agreed that all covenants and promises herein made by the first party shall be obligatory upon the members of the said firm of Cuyler, Morgan & Company jointly and severally, and upon the heirs, executors, administrators, and assigns of them and each of them, and that the obligations of the second party hereunder shall be upon it, its successors or assigns.

EXECUTION.

In witness whereof, upon the date first above written, the first party has hereunto set its hand and seal, and the second

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party has caused these presents to be executed under its corporate seal, by its president and secretary, thereunto duly authorized.

CUYLER, MORGAN & CO.
NILES-BEMENT-POND CO.
(CORPORATE SEAL.) R. C. MCKINNEY, *President.*

Attest:
E. M. C. DAVIS,
Secretary.

The Pratt & Whitney Co. balance sheet at 31st December, 1899

ASSETS

Real estate and buildings, etc		$1,200,514.29
Plant (machinery, tools, and fixtures in use)		1,071,756.24
Inventory:		
Raw material and machinery in process	$420,028.00	
Finished machinery	586,056.23	
		1,006,083.23
Stock in other companies		72,877.67
Patents		40,041.33
Bills and accounts receivable		218,105.15
Cash		53,728.82
		3,663,106.73

LIABILITIES

Capital stock (outstanding):		
8% preferred	$1,750,000.00	
Common	1,000,000.00	
		2,750,000.00
Reserves for:		
Depreciation of plant	208,563.16	
Doubtful accounts	14,164.95	
		222,728.11
Bills and accounts payable		464,840.26
Profit and loss		225,538.36
		3,663,106.73

J. C. STIRLING, *Treasurer.*

XV. The Pratt & Whitney Company stock at the time of its purchase and acquisition by the plaintiff in January, 1901, was worth $154,420.94, and did not cost the plaintiff any more than that sum, nor was anything other than the cash paid for it contributed by the plaintiff as consideration

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therefor. The value of the stock at the time it was purchased and sold to the plaintiff was said sum, $154,420.94, paid in cash for it. It afterwards apparently increased in value, but for what reasons and due to what causes does not satisfactorily appear.

XVI. The difference between the value at acquisition and the cash paid, namely, $1,370,579.06, was entered on plaintiff's books in August, 1902, as of June 30, 1902, as a part of its earned surplus and so remained throughout the years 1917, 1918, and 1919.

XVII. The commissioner, in the determination and assessment of taxes for the years 1917, 1918, and 1919, decreased plaintiff's invested capital by the amount of $1,370,579.06 on account of said Pratt & Whitney stock, including said stock as an asset at the amount of $154,420.94, and no more.

XVIII. In its tax returns for each of the three years involved plaintiff reported the 15,250 shares of Pratt & Whitney stock as an asset at an amount of $1,525,000.

XIX. The value of said Pratt & Whitney stock during the years 1917, 1918, and 1919 was no less than its value at date of acquisition in 1901.

XX. The consolidated invested capital before adjustment for inadmissibles, as determined by the commissioner, was as follows:

For the calendar year 1918	$12, 727, 775. 00
For the calendar year 1919	13, 675, 858. 98

The adjustments for inadmissibles were fixed by the commissioner as follows:

For the calendar year 1918:

(1) Average inadmissible assets during year	$4, 225, 053. 97
(2) Average admissible and inadmissible assets during year	19, 980, 117. 32
Percentage item (1) to item (2)	. 211463
Invested capital before adjustment of inadmissibles	12, 727, 775. 00
Deduction for inadmissibles, 21.1463% of $12,727,775.00	2, 691, 455. 66

For the calendar year 1919:

(1) Average inadmissible assets during year	4, 324, 353. 47
(2) Average admissible and inadmissible assets during year	20, 522, 840. 91

Opinion of the Court

Percentage item (1) to item (2)	.210708
Invested capital before adjustment of inadmissibles	13,675,858.98
Deduction for inadmissibles, 21.0708% of $13,675,858.98	2,881,616.86

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This is a suit to recover taxes for which a claim for refund had been filed. It embraces three grounds of recovery. The first grows out of the claimed right to deduct income and excess-profits taxes paid by plaintiff's branch in England to the British Government. The second involves invested capital for each of the years 1917, 1918, and 1919, and the question whether the value of certain stock purchased by the plaintiff in 1901 should be allowed as a part of its surplus, and the third, whether the plaintiff should be allowed deductions for amounts donated to the American Red Cross and other organizations of a similar character.

We will take up the last of these questions first, as to the donations to the American Red Cross. The facts and the principle of the applicable statutes are for all purposes no different from those in *Consolidated Gas Electric Light & Power Co.* v. *United States*, 65 C. Cls. 252, 257, *et seq.*, where a certiorari was denied on October 15, 1928, and the case of *Afred J. Sweet, Inc.*, v. *United States*, decided by this court February 4, 1929 [66 C. Cls. 654]. It therefore must be held that as to the credit for donations to the Red Cross and other organizations the plaintiff can not recover.

We will next take up the first question of the right to a credit for taxes paid the British Government. The right to recover depends in this instance upon whether the plaintiff kept its books on an accrual or cash basis. An examination of its books and its system of accounts by the Commissioner of Internal Revenue satisfied that official that they were kept on an accrual basis within the meaning of the statute, and he so ruled. It is admitted that no system of bookkeeping will probably be found which is on a 100% accrual basis. In almost every case where books are kept on an accrual basis, as a general principle of business, there

are instances where certain accounts, small and sometimes covering a small percentage, are kept on a cash basis. We therefore concur in the ruling of the commissioner that the books were kept on an accrual basis.

The court has found that while it appears that some of the accounts of the plaintiff were kept upon a cash basis and the British account among them, it does not clearly appear what proportion was kept on the accrual basis, or that the greater proportion of its business was not kept upon the accrual basis as held by the Commissioner of Internal Revenue, and it does not satisfactorily appear that the commissioner was in error in concluding that the books were kept upon an accrual basis.

Without entering into a discussion of when a tax accrues, we conclude from what has just been said that the holding of the commissioner that the books were kept upon an accrual basis must be sustained, it not satisfactorily appearing that in this he was in error, especially as it does not appear that the plaintiff presented any proof of the character of its general books of account in the United States either in 1918 or prior thereto. The presumption is in favor of the commissioner's finding and must be overcome. *United States* v. *Rindskopf*, 105 U. S. 418; *United States* v. *Anderson*, 269 U. S. 422. Where only a relatively small part has been on the cash basis it must be held that the income should have been returned upon an accrual basis. *United States* v. *Anderson*, *supra; W. S. Barstow & Co., Inc.* v. *Bowers*, 15 Fed. (2d) 75; *Theodore Stanfield et al.*, 8 B. T. A. 787, 823; *Hyams Coal Co.* v. *United States*, 26 Fed. (2d) 805; and the *Max Schott case*, 5 B. T. A. 79.

Pratt and Whitney stock.—The plaintiff is here asking for a refund, which was refused, growing out of the following facts: The Commissioner of Internal Revenue in computing the income and excess-profits taxes of the plaintiff for the years 1917, 1918, and 1919, decreased the plaintiff's invested capital by reducing its earned surplus in the sum of $1,370,579.06, which represented the difference between the cash paid, $154,420.94 for 15,250 shares of the stock of the Pratt & Whitney Company, which the plaintiff took over, and the par value of that stock, $100, which the plain-

tiff claims was its value at the time of the purchase. The plaintiff had deducted from this par value the cash purchase price actually paid and had passed the difference, the said sum of $1,370,579.06, to earned surplus. The commissioner held that it was not earned surplus, that the stock was worth the cash sum which the plaintiff paid for it at the time it was purchased and reduced its earned surplus accordingly, and upon this basis assessed a deficiency tax for each of these years.

The question is whether the commissioner was justified in the action which he took.

The court has found that the Pratt & Whitney Co. stock at the time of the purchase was worth no more than what the plaintiff paid for it, viz, $154,420.94, that it did not cost the plaintiff any more than this sum, nor was there anything other than the cash paid for it contributed by the plaintiff as consideration for it, and that the value of the stock at the time it was purchased and sold to the plaintiff was the cash sum paid for it. In view of this finding of the court the case is ruled by *LaBelle Iron Works* v. *United States*, 256 U. S. 377, 387, 388, 391. These considerations dispose of this branch of the plaintiff's claim, and the action of the Commissioner of Internal Revenue is upheld as to this claim.

It follows from the foregoing that the plaintiff is not entitled to recover on any one of the three claims set forth in its petition. The petition should be dismissed, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

CASES DECIDED

IN

THE COURT OF CLAIMS

FEBRUARY 5, 1929, TO MAY 31, 1929

INCLUSIVE, IN WHICH JUDGMENTS WERE RENDERED BUT NO OPINIONS DELIVERED

No. F-213. June 18, 1928

Union Pacific R. R. Co.[1]

Transportation of private mounts of Army officers, $885.58.

No. C-1058. March 11, 1929

Wabash Ry. Co.

Transportation of troops, $87.18.

No. C-459. March 11, 1929

Amos D. Carver et al.

Suspension and cancellation of charter party; just compensation; demurrage for detention of vessel. Dismissed. On mandate of Supreme Court. (64 C. Cls. 1; 278 U. S. 294.)

No. E-124. March 11, 1929

Marietta Mfg. Co. et al.

Contract for construction of towboats, War Department. Dismissed.

No. D-340. March 11, 1929

Carroll E. Miller, jr.

Uniform gratuity, Navy. Dismissed.

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[1] Motion for new trial overruled June 3, 1929.

No. F-110. MARCH 11, 1929

William Crawford.
Contract for extension of hospital. Dismissed.

No. J-564. MARCH 11, 1929

Thomas S. Wylly.
Allowances on account of dependent parent. Dismissed.

No. J-371. MARCH 18, 1929

Lisle Henifin.
Allowances on account of dependent parent. Dismissed.

No. J-551. MARCH 20, 1929

Florence E. Kingsbury.
Death gratuity, U. S. Coast Guard. Dismissed.

No. B-187. APRIL 1, 1929

Western Pacific R. R. Co.
Transportation of armor plate, $8,288.28.

No. E-203. APRIL 1, 1929

Dreifus & Co.
Refund of purchase price of surplus property, $515 00.

No. H-293. APRIL 1, 1929

M. N. Christensen, etc.
Refund of income tax, $987.26 with interest.

No. H-200. APRIL 1, 1929

Fidelity-Philadelphia Trust Co. et al.
Taking of land, $258,925.33 with interest.

No. H-263. APRIL 1, 1929

Frederick Sedgwick.
Infringement of patents. Dismissed.

No. H-345. MAY 6, 1929

William G. Tomlinson.
Recovery of rental and subsistence allowances, Navy; dependent mother, $2,835.47 (as of February 4, 1929). (66 C. Cls. 697.)

No. H-434. May 6, 1929

Lawson Rubber Mfg. Co.
Refund of excise tax, $12,433.63, with interest.

No. H-442. May 6, 1929

Ewart G. Haas.
Recovery of rental and subsistence allowances, Navy; dependent mother, $6,222.00 (as of February 4, 1929). (66 C. Cls. 718.)

No. J-60. May 6, 1929

C. O. Tingley & Co.
Refund of excise tax, $28,000.31, with interest.

No. J-207. May 6, 1929

Walter H. Maloney, receiver.
Refund of excise tax, $18,737.02, with interest.

No. J-278. May 6, 1929

James B. Glennon.
Commutation of quarters, Navy; act of June 10, 1922, as amended by act of May 31, 1924; availability of quarters, $629.30. (66 C. Cls. 723.)

No. H-509. May 6, 1929

Auguste C. E. Rateau.
Infringement of patents. Dismissed.

No. K-24. May 6, 1929

Michael J. Durkin.
Removal from classified service, Treasury Department. Dismissed.

No. H-270. May 6, 1929

Ft. Dodge, Des Moines & Southern R. R. Co.[1]
Reimbursement of deficits during Federal control. Dismissed. (See *Wyandotte Terminal R. R. Co.* v. *United States*, 64 C. Cls. 329.)

[1] Certiorari denied.

No. F–82 MAY 13, 1929

Ithaca Trust Co., executor.

Refund of estate-transfer tax; deductions from gross estate; bequests for religious or charitable purposes; contingency; Treasury Department regulations, $8,219.03, with interest. On mandate of Supreme Court. (64 C. Cls. 686; 279 U. S. 151.)

CASES DECIDED BY THE COURT OF CLAIMS PERTAINING TO TRANSPORTATION OF THE MAILS, WHEREIN JUDGMENTS WERE RENDERED IN FAVOR OF PLAINTIFFS ON AUTHORITY OF NEW YORK CENTRAL R. R. CO., LESSEE, v. UNITED STATES, 65 C. CLS. 115, AND NEVADA COUNTY NARROW GAUGE R. R. CO. v. UNITED STATES, ID. 327, BOTH AFFIRMED BY THE SUPREME COURT, 279 U. S. 73

ON MAY 13, 1929

F–223. Lake Tahoe Ry. & Transp. Co., $3,342.70.
F–224. Quincy R. R., $1,536.74.
F–225. Bingham & Garfield Ry., $535.99.
F–226. Nevada Northern Ry. Co., $38,612.15.
F–227. Indian Valley R. R., $4,778.97.
F–228. Sacramento Valley & Eastern Ry., $2,683.69.
F–229. Great Southern R. R., $8,802.46.
F–230. McCloud River R. R., $7,425.49.
F–231. California Western R. R. & Nav. Co., $13,123.13.
F–232. Pacific & Idaho Northern Ry. Co., $30,153.75.
F–233. Laramie, North Peak & Western R. R., $10,857.52.
F–234. Spokane International Ry., $50,744.84.
F–235. Sierra Ry. Co. of Calif., $34,288.86.
F–236. San Diego & Arizona Ry. Co., $28,070.10.
F–237. Sumpter Valley Ry. Co., $39,-872.10.
F–238. Washington, Idaho & Montana Ry., $10,369.38.
F–239. Yreka R. R. Co., $3,295.51.
F–240. Yosemite Valley R. R. Co., $35,735.13.
F–279. J. J. Wilson, receiver, $8,415.35.
F–297. New York, New Haven & Hartford R. R. Co., $1,-388,325.74.
F–298. Central New England Ry. Co., $21,039.17.
F–303. Maine Central R. R. Co., $311,-663.71.
F–305. C. A. Robinson, receiver, $6,-975.05.
F–320. Bangor & Aroostook R. R. Co., $80,406.03.
F–330. Rutland R. R. Co., $113,220.37.
F–357. Boston & Maine R. R., $853,-259.14.
F–367. Central Vermont Ry. Co., $87,355.50.
F–376. Tonopah & Goldfield R. R. Co., $6,200.29.
F–377. Canadian National Ry. Co., $14,170.04.
F–389. Nevada Central R. R. Co., $10,007.08.
F–392. St. Johnsbury & Lake Champlain R. R. Co., $11,750.84.
F–394. Montpelier & Wells River R. R., $6,128.63.
F–401. York Harbor & Beach R. R. Co., $848.99.
H–296. Utah Ry. Co., $2,365.13.
J–191. Alabama, Tennessee & Northern R. R. Co., $17,034.32.

CASES PERTAINING TO REFUND OF TAXES, DISMISSED BY THE COURT OF CLAIMS

ON FEBRUARY 6, 1929

J–16. Frederick C. Hubbell.
J–17. Frederick C. Hubbell.
J–18. Frederick C. Hubbell.

ON MARCH 11, 1929

D–544. Robert Wetherill.
D–545. Richard Wetherill.
D–1048. Burd High Compression Ring Co.
E–126. Harward Mfg. Co.
E–127. Inland Products Co.
E–153. General Motors Corp.
E–593. Norfolk & Western R. R.
H–32. Anita H. Cooper.[1]
H–87. Walker Mfg. Co.
H–435. Amplus Storage Battery Co.
J–30. Roos Bros. Inc.
J–232. I. T. S. Rubber Co.
J–263. Forman, Ford & Co.
J–276. Clinchfield Coal Corp.
J–316. A. J. Carr Co.
J–363. S. & N. Katz.
J–577. G. W. Sheldon & Co.
J–587. Mamie E. Rhomberg et al., executors.
J–633. Myers Coal & Coke Co.
J–655. Eva Follett Warner.
J–676. Emerson Electric Mfg. Co.

ON MARCH 18, 1929

F–31. California Casualty Indemnity Exchange et al.
F–32. Lumbermen's Reciprocal Association et al.
F–33. Merchants' Reciprocal Underwriters et al.
F–62. Pennsylvania Indemnity Exchange et al.
F–120. National Retail Lumber Dealers Inter-Insurance Exchange et al.
H–471. Cole Storage Battery Co.
H–480. Panama Rubber & Equipment Co.
H–482. Marko Storage Battery Co.
H–498. Rainbow Battery Mfg. Co.
H–501. Nathan Wise.
H–502. Jensen Battery Mfg. Co.
J–152. Laura H. Jennings, executrix.
J–198. Bridgeman-Russell Co.

ON APRIL 1, 1929

E–500. Clinton Corn Syrup Refining Co.[2]
F–34. American Exchange Underwriters.
F–35. California Casualty Indemnity Exchange.
F–36. Casualty Indemnity Exchange.
F–37. Druggists Indemnity Exchange.
F–38. Hardware Underwriters.
F–39. Individual Underwriters.
F–40. Inter-Insurers Exchange.
F–41. Lumbermen's Exchange.
F–42. Lumbermen's Reciprocal Association.
F–43. New York Reciprocal Underwriters.

[1] Certiorari granted.
[2] Certiorari denied.

F–44. North American Inter-Insurers.
F–45. Reciprocal Annex.
F–46. Reciprocal Underwriters.
F–47. Retail Lumbermen's Inter-Insurance Exchange.
F–48. Utilities Indemnity Exchange.
F–111. L. Jonas & Co.
F–196. Vesta Battery Corporation.[1]
F–218. Western Industries Co.
F–355. George A. Dascomb et al.
H–64. Payne Shoe Co.
H–244. Shudders Gale Grocer Co.
J–122. Union Cotton Manufacturers Co.
J–154. Jeannette G. W. Kelsey et al.

[1] Certiorari granted.

ON MAY 6, 1929

D-922. George W. Mitton et al., trustees.
E-227. John Bene & Sons.
E-540. O'Gara Coal Co.
F-16. Fidelity Savings & Loan Asso.
F-69. Emily S. Picher et al.
F-144. John G. Livingston.
F-150. Frank W. Cooper.
F-201. Kennedy Company.
F-337. First Trust & Savings Bank, trustee.
H-51. Chase National Bank of New York et al.
H-169. Helen S. Schmidt.
H-264. J. Walter Thompson Co.
H-491. Mrs. M. E. Tucker, guardian.
H-550. Stephen Putney Shoe Co.
J-41. Mary D. A. Sayles.
J-135. C. J. Bruner.
J-143. Charleston & Western Carolina Ry. Co.
J-146. Sidney A. Eisemann.
J-147. Lawrence Ilfeld.
J-148. Walter C. Donald.
J-149. Emil Nilsson.
J-158. Chain Products Co.
J-262. Walter Powers, receiver.
J-317. Pocahontas Tanning Co.
J-365. Bull Creek Coal Co.
J-671. Verd Mont Mills Co.
K-1. Marie M. Butler.
K-4. Lewis Mfg. Co.
K-56. Maude R. Gilbert.
K-71. Globe Forge & Foundries.

ON MAY 8, 1929

K-45. Clinton Saddlery Co.

ON MAY 13, 1929

F-98. Chicago & Eastern Illinois Ry. Co.
J-249. A. Leschen & Sons Rope Co.

CASES DISMISSED BY THE COURT OF CLAIMS PERTAINING TO TRANSPORTATION FURNISHED THE GOVERNMENT BY COMMON CARRIERS

ON MARCH 11, 1929

E-306. Atlantic Coast Line R. R. Co.
E-382. Michigan Central R. R. Co.
H-48. H. E. Byram et al., receivers, etc.

ON MARCH 18, 1929

A-38. El Paso & Southwestern Co. et al.
A-279. El Paso & Southwestern Co. et al.
A-294. El Paso & Southwestern Co. et al.

ON APRIL 1, 1929

B-418. Southern Pacific Co.

ABSTRACT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

ITHACA TRUST CO., EXECUTOR AND TRUSTEE, v. UNITED STATES

[64 C. Cls. 686; 279 U. S. 151]

Judgment was rendered in favor of the United States in the court below. Upon certiorari the judgment was *reversed*, the Supreme Court deciding:

1. Where a will makes bequests to charities, to be paid after the death of the testator's wife from a residuary estate bequeathed to her for life, and allows the wife to use from the principal any sum "that may be necessary to suitably maintain her in as much comfort as she now enjoys," and the income of the estate at the death of the testator, after paying specific debts and legacies, is more than sufficient to maintain the widow as required, her authority to draw on the principal, being thus limited by a standard fixed in fact and capable of being stated in definite terms of money, does not render the value of the charitable bequests so uncertain as to prevent their deduction from gross income, under sec. 403(a)(3) of the revenue act of 1918, in computing the estate tax.
2. The estate tax being on the act of the testator and not on the receipt of property by legatees, the estate transferred is to be valued as of the time of the testator's death.
3. Therefore, the value of a life estate is to be determined on the basis of life expectancy as of that time, even though the life tenant died before the time came for computing and returning the tax.

Mr. Justice Holmes delivered the opinion of the Supreme Court April 8, 1929.

INDEX DIGEST

CHARTER PARTY.

I. Where the person named in a contract as charterer is given full control and disposal of the vessel, including its navigation, and the agreement is to "redeliver" the vessel, the contract is one of demise and not for services. *Middlebrook, receiver*, 294.

II. Where the captain of a vessel acts merely as sailing master and the orders he gives do not go beyond taking the vessel wherever directed by the charterer, the control of navigation, with respect to the question of demise or contract for services, is with the charterer. *Id.*

III. Fire which destroys a vessel while engaged in transferring its cargo to another vessel, due to the character of the cargo, is not a peril "necessarily incident to navigation," and does not come under the head of marine risk. Where the terms of the vessel's demise required return in good condition, ordinary wear excepted, the charterer is liable for the value of the vessel destroyed. *Id.*

IV. Where the Government chartered a vessel from a company which it recognized as the owner, paid thereto the charter hire, and the charter party required redelivery to the same, and another company, with knowledge of all these facts, stood by, made no claim of ownership, control, or right to receive payment for charter hire, and did not intervene in the action for value of the vessel by reason of its destruction, the company that is party to the contract is not precluded from recovery because of any right the other company might have against it. *Id.*

CONTRACTS.

I. Where the schedule of delivery in a coal contract is "as called for on or before" a designated date, and the contract further provides that "at expiration of this contract any undelivered material not covered by calls will be automatically canceled," there is no obligation on the part of the purchaser to take more than the amounts called for during the life of the contract, and a failure to take more is not a breach, nor is notice given by the purchaser before the expiration of the contract that it will take no more coal than that already ordered a cancellation of the contract. *Bickett Coal & Coke Co.*, 53.

II. Plaintiff's contract with the Government, entered into September 19, 1918, having been canceled under the act of June 15, 1917, it is entitled to recover the actual expenditures necessary to perform the contract, less the market value at the time of cancellation of material retained, together with interest on the amount of recovery from date of cancellation until paid. *Harrisburg Pipe Co.*, 138.

III. Receipt voluntarily executed by plaintiff, of an amount stated therein and shown as balance due under contract, *held*, in the absence of satisfactory evidence of misrepresentations to secure his signature, to preclude further recovery. *Martin*, 247.

IV. The findings failing to show a contract, proof of actual expenditures on work authorized by the Government, or satisfactory proof of traveling expenses in connection therewith, the petition was dismissed. See Dent Act, March 2, 1919, 40 Stat. 1272. *Knight et al.*, 267.

V. Where delay in completion of a contract is due in part to the Government, which has made changes in specifications and by agreement continued the contract in force, failure to complete the work within the time originally agreed upon is no defense to a suit for balance of fixed profit. *Standard Steel Car Co.*, 445.

VI. Where delays have been caused by both parties to a contract, resulting in the work not being completed until after the contract period, there is no longer a fixed date for completion. There being no date from which the time can be reckoned, liquidated damages for such delays can not be allowed. *Id.*

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